

***Form 7500***

**General Provisions  
for Subcontracts  
Section B**

**July 2000**

***LOS ALAMOS***

**Los Alamos National Laboratory**

**Los Alamos, NM 87545**

## Form 7500, Section B

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### Section B Clauses Apply to All Types of Subcontracts.

The clauses listed below are appropriate to all types of subcontracts regardless of pricing arrangement. Clauses in this section are incorporated into subcontracts by specifically citing clause numbers in the Schedule.

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## B1, Accounts, Records, and Inspection

- (a) **Accounts.** The Subcontractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting all allowable costs incurred, or anticipated to be incurred, revenues or other applicable credits, fixed-fee accruals, and the receipt, use, and disposition of all Government property coming into the possession of the Subcontractor under this subcontract. The system of accounts employed by the Subcontractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles and consistently applied.
- (b) **Inspection and Audit of Accounts and Records.** All books of account and records relating to this subcontract shall be subject to inspection and audit by DOE at all reasonable times, before and during the period of retention provided for in (d) below, and the subcontractor shall afford DOE and/or the University proper facilities for such inspection and audit.
- (c) **Audit of Lower-tier Subcontractor's Records.** The Subcontractor also agrees, with respect to any lower-tier subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the lower-tier subcontract, costs incurred are a factor in determining the amount payable to the lower-tier subcontractor at any tier, to either conduct an audit of the lower-tier subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the DOE contracting officer.
- (d) **Disposition of Records.** Except as agreed upon by the University and the Subcontractor, all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this subcontract, shall be delivered to the University or otherwise disposed of by the Subcontractor either as the University from time to time direct during the progress of work or, in any event, as the University shall direct upon completion or termination of this subcontract and final audit of accounts hereunder. Except as provided in this subcontract, all other records in the possession of the Subcontractor relating to this subcontract shall be preserved by the Subcontractor for a period of three (3) years after final payment under this subcontract or otherwise disposed of in such manner as may be agreed upon by the University and the Subcontractor.
- (e) **Reports.** The Subcontractor shall furnish such progress reports and schedules, financial and cost reports, and other reports covering the work under this subcontract as the University may from time to time require.
- (f) **Inspections.** The DOE and the University shall have the right to inspect the work and activities of the Subcontractor under this subcontract at such time in such manner as it shall deem appropriate.
- (g) **Lower-tier Subcontracts.** The Subcontractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through this paragraph (g) of this clause in all lower-tier subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the lower-tier subcontract, costs incurred are a factor in determining the amount payable to the lower-tier subcontractor. The Subcontractor further agrees to include an audit clause, the substance of which is Clause B5, Price Reduction for Defective Cost or Pricing Data.

## B2, Additional Paragraph (h) to Clause B1.

For all cost-type subcontracts (or lower-tier subcontracts) involving an estimated cost exceeding \$5 million and expected to run more than two (2) years, and (b) any other cost-type subcontract (or lower-tier subcontract) where deemed advisable by the University and when the Subcontractor (or lower-tier subcontractor) already has an established internal audit organization.

- (h) **Internal Audits.** The Subcontractor agrees to conduct an internal audit and examination satisfactory to DOE and the University of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this subcontract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the DOE Contracting Officer and/or the University.

## B3, Administration of Cost Accounting Standards

For the purpose of administering the Cost Accounting Standards (CAS) requirements under this subcontract, the Subcontractor shall take the steps outlined in paragraphs (a) through (g) of this clause:

- (a) Submit to the Government Contracting Officer a description of any cost accounting practice change, the total potential impact of the change on contracts containing a CAS clause, and a general dollar magnitude of the change which identifies the potential shift of costs between CAS-covered contracts by contract type (i.e., firm-fixed-price, incentive, cost-plus-fixed fee, etc.) and other subcontractor business activity. As related to CAS-covered contracts, the analysis should identify the potential impact on funds of the various Agencies/Departments (i.e., Department of Energy, National Aeronautics and Space Administration, Army, Navy, Air Force, other Department of Defense, other Government) as follows:
  - (1) For any change in cost accounting practices required in accordance with subparagraph (a)(3) and subdivision (a)(4)(i) of the clause at FAR 52.230-2, Cost Accounting Standards; or subparagraph (a)(3) and subdivisions (a)(4)(i) or (a)(4)(iv) of the clause at FAR 52.230-5, Cost Accounting Standards-Educational Institution; within 60 days (or such other date as may be mutually agreed to) after award of a contract requiring this change.
  - (2) For any change in cost accounting practices proposed in accordance with subdivision (a)(4)(ii) or (iii) of the clauses at FAR 52.230-2, Cost Accounting Standards, and FAR 52.230-5, Cost Accounting Standards-Educational Institution; or with subparagraph (a)(3) of the clause at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices, not less than 60 days (or such other date as may be mutually agreed to) before the effective date of the proposed change.
  - (3) For any failure to comply with an applicable CAS or to follow a disclosed practice (as contemplated by subparagraph (a)(5) at FAR 52.230-2, Cost Accounting Standards, and FAR 52.230-5, Cost Accounting Standards-Educational Institution; or by subparagraph (a)(4) at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices):

- (i) Within 60 days (or such other date as may be mutually agreed to) after the date of agreement with the initial finding of noncompliance, or
  - (ii) In the event of Subcontractor disagreement with the initial finding of noncompliance, within 60 days of the date the Subcontractor is notified by the Government Contracting Officer of the determination of noncompliance.
- (b) After an ACO, or cognizant Federal agency official, determination of materiality, submit a cost impact proposal in the form and manner specified by the Government Contracting Officer within 60 days (or such other date as may be mutually agreed to) after the date of determination of the adequacy and compliance of a change submitted pursuant to paragraph (a) of this clause. The cost impact proposal shall be in sufficient detail to permit evaluation, determination, and negotiation of the cost impact upon each separate CAS-covered contract and subcontract.
  - (1) Cost impact proposals submitted for changes in cost accounting practices required in accordance with subparagraph (a)(3) and subdivision (a)(4)(i) of the clause at FAR 52.230-2, Cost Accounting Standards; or subparagraph (a)(3) and subdivisions (a)(4)(i) or (a)(4)(iv) of the clause at FAR 52.230-5, Cost Accounting Standards-Educational Institution; shall identify the applicable standard or cost principle and all contracts and subcontracts containing the clauses entitled Cost Accounting Standards or Cost Accounting Standards-Educational Institution, which have an award date before the effective date of that standard or cost principle.
  - (2) Cost impact proposals submitted for any change in cost accounting practices proposed in accordance with subdivisions (a)(4)(ii) or (iii) of the clauses at FAR 52.230-2, Cost Accounting Standards, and FAR 52.230-5, Cost Accounting Standards-Educational Institution; or with subparagraph (a)(3) of the clause at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices; shall identify all contracts and subcontracts containing the clauses at FAR 52.230-2, Cost Accounting Standards, FAR 52.230-5, Cost Accounting Standards-Educational Institution, and FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices.
  - (3) Cost impact proposals submitted for failure to comply with an applicable CAS or to follow a disclosed practice as contemplated by subparagraph (a)(5) of the clauses at FAR 52.230-2, Cost Accounting Standards, and FAR 52.230-5, Cost Accounting Standards-Educational Institution; or by subparagraph (a)(4) of the clause at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices, shall identify the cost impact on each separate CAS covered contract from the date of failure to comply until the noncompliance is corrected.
- (c) If the submissions required by paragraphs (a) and (b) of this clause are not submitted within the specified time, or any extension granted by the Government Contracting Officer, an amount not to exceed 10 percent of each subsequent amount determined payable related to the Subcontractor's CAS-covered prime contracts, up to the estimated general dollar magnitude of the cost impact, may be withheld until such time as the required submission has been provided in the form and manner specified by the Government Contracting Officer.
- (d) Agree to appropriate contract and subcontract amendments to reflect adjustments established in accordance with subparagraphs (a)(4) and (a)(5) of the clauses at FAR

52.230-2 and 52.230-5: or with subparagraphs (a)(3) or (a)(4) of the Disclosure and Consistency of Cost Accounting Practices clause at FAR 52.230-3.

- (e) For all lower-tier subcontracts subject to the clauses at FAR 52.230-2, 52.230-3. or 52.230-5--
  - (1) So state in the body of the subcontract, in the letter of award, or in both (self-deleting clauses shall not be used, and
  - (2) Include the substance of this clause in all negotiated subcontracts. In addition, within 30 days after award of the subcontract, submit the following information to the Contractor's cognizant Government contract administration office for transmittal to the Government contract administrative office cognizant of the subcontractor's facility:
    - (i) Subcontractor's name and subcontract number.
    - (ii) Dollar amount and date of award.
    - (iii) Name of Contractor making the award.
    - (iv) Any changes the lower-tier subcontractor has made or proposes to make to cost accounting practices that affect prime contracts or subcontracts containing the clauses at FAR 52.230-2, 52.230-3, or 52.230-5, unless these changes have already been reported. If award of the lower-tier subcontract results in making one or more CAS effective for the first time, this fact shall also be reported.
- (f) Notify the University contract administrator in writing of any adjustments required to lower-tier subcontracts under this subcontract and agree to an adjustment, based on them. to this subcontract price or estimated cost and fee. This notice is due within 30 days after proposed subcontract adjustments are received and shall include a proposal for adjusting the lower-tier subcontract or this subcontract appropriately.
- (g) For lower-tier subcontracts containing the clauses at FAR 52.230-2 or 52.230-5, require the lower-tier subcontractor to comply with all Standards in effect on the date of award or of final agreement on price, as shown on the lower-tier subcontractor's signed Certificate of Current Cost or Pricing Data, whichever is earlier.

## **B4, Cost Accounting Standards**

- (a) Unless the subcontract is exempt under 48 CFR 9903.201-1 and 9903.201-2, the provisions of 48 CFR Part 9903 are incorporated herein by reference and the Subcontractor. in connection with this subcontract, shall—
  - (1) (CAS-covered Contracts Only) By submission of a Disclosure Statement. disclose in writing the Subcontractor's cost accounting, practices as required by 48 CFR 9903.202-1 through 9903.202-5, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs. The practices disclosed for this subcontract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Subcontractor and which contain a Cost Accounting Standards (CAS) clause. If the Subcontractor has notified the Government Contracting Officer or the University that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and

confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government or the University.

- (2) Follow consistently the Subcontractor's cost accounting practices in accumulating and reporting contract performance cost data concerning this subcontract. If any change in cost accounting practices is made for the purposes of any contract or subcontract subject to CAS requirements, the change must be applied prospectively to this subcontract and the Disclosure Statement must be amended accordingly. If the subcontract price or cost allowance of this subcontract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) of this clause, as appropriate.
- (3) Comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR Part 9904, in effect on the date of award of this subcontract or, if the Subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Subcontractor's signed certificate of current cost or pricing data. The Subcontractor shall also comply with any CAS (or modifications to CAS) which hereafter become applicable to a contract or subcontract of the Subcontractor. Such compliance shall be required prospectively from the date of applicability to such contract or subcontract.
- (4)
  - (i) Agree to an equitable adjustment as provided in the Changes clause of this subcontract if the subcontract cost is affected by a change which, pursuant to subparagraph (a)(3) of this clause, the Subcontractor is required to make to the Subcontractor's established cost accounting practices.
  - (ii) Negotiate with the Government Contracting Officer or the University to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of subparagraph (a)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by the University or the United States.
  - (iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (a)(4)(i) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this subcontract.
- (5) Agree to an adjustment of the subcontract price or cost allowance, as appropriate, if the Subcontractor or a lower-tier subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by the United States or the University. Such adjustment shall provide for recovery of the increased costs to the United States or the University, together with interest thereon computed at the annual rate established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for such period, from the time the payment by the United States or the University was made to the time the adjustment is effected. In no case shall the Government or the University recover costs greater than the increased cost to the Government or the University, in the aggregate, on the relevant subcontracts subject to the price adjustment, unless the Subcontractor made a change in its cost accounting



practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to the University or the Government.

- (b) If the parties fail to agree whether the Subcontractor or a lower-tier subcontractor has complied with an applicable CAS in 48 CFR 9904 or a CAS rule or regulation in 48 CFR 9903 and as to any cost adjustment demanded by the United States or the University, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).
- (c) The Subcontractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.
- (d) The Subcontractor shall include in all negotiated lower-tier subcontracts which the Subcontractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the lower-tier subcontractor's award date or if the lower-tier subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the lower-tier subcontractor's signed Certificate of Current Cost or Pricing Data. This requirement shall apply only to negotiated lower-tier subcontracts in excess of \$500,000 where the price negotiated is not based on-
  - (1) Established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (2) Prices set by law or regulation, and except that the requirement shall not apply to negotiated lower-tier subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

## **B5, Cost Accounting Standards - Educational Institution**

- (a) Unless the subcontract is exempt under 48 CFR 9903.201-1 and 9903.201-2, the provisions of 48 CFR 9903 are incorporated herein by reference and the Subcontractor, in connection with this subcontract, shall-
  - (1) (CAS-covered Contracts Only) If a business unit of an educational institution required to submit a Disclosure Statement, disclose in writing the Subcontractor's cost accounting practices as required by 48 CFR 9903.202-1 through 9903.202-5, including methods of distinguishing direct costs from indirect costs and the basis used for accumulating and allocating indirect costs. The practices disclosed for this subcontract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Subcontractor and which contain a Cost Accounting Standards (CAS) clause. If the Subcontractor has notified the Government Contracting Officer or the University that the Disclosure Statement contains trade secrets, and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government or the University.
  - (2) Follow consistently the Subcontractor's cost accounting practices in accumulating and reporting contract performance cost data concerning this subcontract. If any change in cost accounting practices is made for the

purposes of any contract or subcontract subject to CAS requirements, the change must be applied prospectively to this subcontract and the Disclosure Statement, if required. must be amended accordingly. If an accounting principle change mandated under Office of Management and Budget (OMB) Circular A-21, Cost Principles for Educational Institutions, requires that a change in the Subcontractor's cost accounting practices be made after the date of this subcontract award, the change must be applied prospectively to this subcontract and the Disclosure Statement, if required, must be amended accordingly. If the subcontract price or cost allowance of this subcontract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) of this clause, as appropriate.

- (3) Comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR 9905 in effect on the date of award of this subcontract or, if the Subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Subcontractor's signed certificate of current cost or pricing data. The Subcontractor shall also comply with any CAS (or modifications to CAS) which hereafter become applicable to a contract or subcontract of the Subcontractor. Such compliance shall be required prospectively from the date of applicability to such contract or subcontract.
- (4)
  - (i) Agree to an equitable adjustment as provided in the Changes clause of this subcontract if the subcontract cost is affected by a change which, pursuant to subparagraph (a)(3) of this clause, the Subcontractor is required to make to the Subcontractor's established cost accounting practices.
  - (ii) Negotiate with the Government Contracting Officer to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of subparagraph (a)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by the United States or the University.
  - (iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (a)(4)(i) or (a)(4)(iv) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this subcontract.
  - (iv) Agree to an equitable adjustment as provided in the Changes clause of this subcontract, if the subcontract cost is materially affected by an OMB Circular A-21 accounting principle amendment which, on becoming effective after the date of subcontract award, requires the Subcontractor to make a change to the Subcontractor's established cost accounting practices.
- (5) Agree to an adjustment of the subcontract price or cost allowance, as appropriate, if the Subcontractor or a lower-tier subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by the United States or the University. Such adjustment shall provide for recovery of the increased costs to the United States or the University, together with interest thereon computed at the annual rate established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for such period, from the time

the payment by the United States or the University was made to the time the adjustment is effected. In no case shall the Government or the University recover costs greater than the increased cost to the Government or the University, in the aggregate, on the relevant subcontracts subject to the price adjustment, unless the Subcontractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to the Government or the University.

- (b) If the parties fail to agree whether the Subcontractor or a lower-tier subcontractor has complied with an applicable CAS or a CAS rule or regulation in 48 CFR 9903 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).
- (c) The Subcontractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.
- (d) The Subcontractor shall include in all negotiated lower-tier subcontracts which the Subcontractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other lower-tier subcontracts, of any-tier, including the obligation to comply with all applicable CAS in effect on the lower-tier subcontractor's award date or, if the lower-tier subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the lower-tier subcontractor's signed Certificate of Current Cost or Pricing Data, except that
  - (1) If the lower-tier subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 48 CFR 9903.201-4 shall be inserted; and
  - (2) This requirement shall apply only to negotiated lower-tier subcontracts in excess of \$500,000 where the price negotiated is not based on—
    - (i) Established catalog or market prices of commercial items sold in substantial quantities to the general public; or
    - (ii) Prices set by law or regulation, and except that the requirement shall not apply to negotiated lower-tier subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

## **B6, Disclosure and Consistency of Cost Accounting Practices**

- (a) The Subcontractor, in connection with this subcontract, shall—
  - (1) Comply with the requirements of 48 CFR 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs; 48 CFR 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose; 48 CFR 9904.405, Accounting for Unallowable Costs; and 48 CFR 9904.406, Cost Accounting Standard-Cost Accounting Period, in effect on the date of award of this contract as indicated in 48 CFR Part 9904.
  - (2) (CAS-covered Contracts Only) If it is a business unit of a company required to submit a Disclosure Statement, disclose in writing its cost accounting practices

as required by 48 CFR 9903.202-1 through 9903.202-5. If the Subcontractor has notified the Contracting Officer or the University that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government or the University.

- (3)
    - (i) Follow consistently the Subcontractor's cost accounting practices. A change to such practices may be proposed, however, by either the Government or the Subcontractor, and the Subcontractor agrees to negotiate with the Government Contracting Officer the terms and conditions under which a change may be made. After the terms and conditions under which the change is to be made have been agreed to, the change must be applied prospectively to this subcontract, and the Disclosure Statement, if affected, must be amended accordingly.
    - (ii) The Subcontractor shall, when the parties agree to a change to a cost accounting practice and the Government Contracting Officer has made the finding required in 48 CFR 9903.201-6(b), that the change is desirable and not detrimental to the interests of the Government, negotiate an equitable adjustment as provided in the Changes clause of this subcontract. In the absence of the required finding, no agreement may be made under this subcontract clause that will increase costs paid by the United States or the University
  - (4) Agree to an adjustment of the subcontract price or cost allowance, as appropriate, if the Subcontractor or a lower-tier subcontractor fails to comply with the applicable CAS or to follow any cost accounting practice, and such failure results in any increased costs paid by the United States or the University. Such adjustment shall provide for recovery of the increased costs to the United States or the University together with interest thereon computed at the annual rate of interest established under the Internal Revenue Code of 1986 (26 U.S.C. 6621), from the time the payment by the United States or the University was made to the time the adjustment is effected.
- (b) If the parties fail to agree whether the Subcontractor has complied with an applicable CAS, rule, or regulation as specified in 48 CFR 9903 and 9904 and as to any cost adjustment demanded by the United States or the University, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).
- (c) The Subcontractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, and records relating to compliance with the requirements of this clause.
- (d) The Subcontractor shall include in all negotiated lower-tier subcontracts, which the Subcontractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other lower-tier subcontracts of any tier, except that
  - (1) If the lower-tier subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201 is required to follow all CAS, the clause entitled "Cost Accounting Standards" set forth in FAR 52.230-2, shall be inserted in lieu of this clause; or
  - (2) This requirement shall apply only to negotiated lower-tier subcontracts in excess of \$500,000 where the price negotiated is not based on-

- (i) Established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (ii) Price set by law or regulation; or
- (3) The requirement shall not apply to negotiated lower-tier subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

## **B7, Facilities Capital Cost of Money**

Facilities capital cost of money will be an allowable cost under the contemplated subcontract, if the criteria for allowability in subparagraph 31.205-10(a)(2) of the FAR are met and facilities capital cost of money was included in the offer resulting in the subcontract.

## **B8, Waiver of Facilities Capital Cost of Money**

The Subcontractor did not include facilities capital cost of money as a proposed cost of this subcontract. Therefore, it is an unallowable cost under this subcontract.

## **B9, Price Reduction for Defective Cost or Pricing Data**

- (a) If any price, including profit or fee, negotiated in connection with the subcontract or any cost reimbursable under the subcontract was increased by any significant amount because (1) the Subcontractor or a lower-tier subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data; (2) a lower-tier subcontractor or prospective lower-tier subcontractor furnished the Subcontractor cost or pricing data that were not complete, accurate, and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data; or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the subcontract shall be modified to reflect the reduction.
- (b) Any reduction in the subcontract price under paragraph (a) above due to defective data from a prospective lower-tier subcontractor that was not subsequently awarded the lower-tier subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual lower-tier subcontract or (2) the actual cost to the Subcontractor, if there was no lower-tier subcontract, was less than the prospective lower-tier subcontract cost estimate submitted by the Subcontractor, provided that the actual lower-tier subcontract price was not itself affected by defective cost or pricing data.
- (c)
  - (1) If the University determines under paragraph (a) of this clause that a price or cost reduction should be made, the Subcontractor agrees not to raise the following matters as a defense:
    - (i) The Subcontractor or lower-tier subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of

the subcontract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.

- (ii) The University should have known that the cost or pricing data in issue were defective even though the Subcontractor or lower-tier subcontractor took no affirmative action to bring the character of the data to the attention of the University.
  - (iii) The subcontract was based on an agreement about the total cost of the subcontract and there was no agreement about the cost of each item procured under the subcontract.
  - (iv) The Subcontractor or lower-tier subcontractor did not submit a Certificate of Current Cost or Pricing Data.
- (2) (i) Except as prohibited by subdivision (c)(2)(ii) of this clause, an offset in an amount determined appropriate by the University based upon the facts shall be allowed against the amount of a contract price reduction if
- (A) The Subcontractor certifies to the University that, to the best of the Subcontractor's knowledge and belief, the Subcontractor is entitled to the offset in the amount requested; and
  - (B) The Subcontractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.
- (ii) An offset shall not be allowed if
- (A) The understated data was known by the Subcontractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or
  - (B) The University or the Government proves that the facts demonstrate that the subcontract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.
- (d) If any reduction in the subcontract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Subcontractor shall be liable to and shall pay the University at the time such overpayment is repaid. Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Subcontractor to the date the University is repaid by the Subcontractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of The Treasury under 26 U.S.C. 6621(a)(2).

## **B10, Price Reduction for Defective Cost or Pricing Data - Modifications**

- (a) This clause shall become operative only for any modification to the subcontract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1), except that this clause does not apply to any modification for which the price is
- (1) Based on adequate price competition;
  - (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (3) Set by law or regulation.
- (b) If any price, including profit or fee, negotiated in connection with any modification under this clause or any cost reimbursable under the subcontract was increased by any significant amount because (1) the Subcontractor or a lower-tier subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data; (2) a lower-tier subcontractor or prospective lower-tier subcontractor furnished the Subcontractor cost or pricing data that were not complete, accurate, and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data; or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the subcontract shall be modified to reflect the reduction. This right to a price reduction is limited to that reduction resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) above.
- (c) Any reduction in the subcontract price under paragraph (b) above because of defective data from a prospective lower-tier subcontractor that was not subsequently awarded the lower-tier subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual lower-tier subcontract or (2) the actual cost to the Subcontractor, if there was no lower-tier subcontract, was less than the prospective lower-tier subcontract cost estimate submitted by the Subcontractor, provided that the actual lower-tier subcontract price was not itself affected by defective cost or pricing data.
- (d) (1) If the University determines under paragraph (b) of this clause that a price or cost reduction should be made, the Subcontractor agrees not to raise the following matters as a defense:
- (i) The subcontractor or lower-tier subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the subcontract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.
  - (ii) The University should have known that the cost or pricing data in issue were defective even though the Subcontractor or lower-tier subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.
  - (iii) The subcontract was based on an agreement about the total cost of the subcontract and there was no agreement about the cost of each item procured under the subcontract.
  - (iv) The Subcontractor or lower-tier subcontractor did not submit a Certificate of Current Cost or Pricing Data.

- (2) (i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the University based upon the facts shall be allowed against the amount of a contract price reduction if
  - (A) The Subcontractor certifies to the University that, to the best of the Subcontractor's knowledge and belief, the Subcontractor is entitled to the offset in the amount requested; and
  - (B) The Subcontractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.
- (ii) An offset shall not be allowed if --
  - (A) The understated data was known by the Subcontractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or
  - (B) The University or the Government proves that the facts demonstrate that the subcontract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.
- (e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Subcontractor shall be liable to and shall pay the University at the time such overpayment is repaid. Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Subcontractor to the date the Government is repaid by the Subcontractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of The Treasury under 26 U.S.C. 6621(a)(2).

## **B11, Subcontractor Cost or Pricing Data**

- (a) The following clause shall be inserted in all subcontracts where such subcontracts exceed the cost or pricing data threshold at FAR 15.804-2(a)(1), even though the original amount of the subcontract was below the threshold.

### **CERTIFIED COST OR PRICING DATA (December 1994)**

- (a) (1) The Subcontractor shall require under the situations described in (2) below, unless exempted under the exceptions set forth in (3) below, each lower-tier subcontractor under this subcontract to submit cost or pricing data and to certify that, to the best of his knowledge and belief, such cost or pricing data are accurate, complete and current.
- (2) Except as provided in (a)(3) of this clause, certified cost or pricing data shall be submitted prior to (i) (I) the award of each lower-tier subcontract, the price of which is expected to exceed the cost or pricing data threshold at FAR 15.804-2(a)(1), and (ii) the negotiation of the price of each change or modification to the lower-tier subcontract under this subcontract for which the price adjustment is expected to exceed the cost or pricing data threshold at FAR 15.804-2(a)(1).



(3) Certified cost or pricing data need not be furnished pursuant to this paragraph (a) where (i) the subcontractor has not been required to furnish cost or pricing data; or (ii) the price adjustment is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or the prices are set by law or regulation; and the Subcontractor states in writing the basis for applying this exception.

(4) In submitting the cost or pricing data, the lower-tier subcontractor shall use the form of certificate set forth in paragraph (b) below and shall certify that the data are accurate, complete, and current. Such certificate and data (actual or identified, as provided in the certificate prescribed below) shall be submitted by lower-tier subcontractors to the Subcontractor, as applicable, for retention.

- (b) The certificates required by this clause shall be in the form set forth below.

**Subcontractor's Certificate of Current Cost or Pricing Data**

This is to certify that, to the best of my knowledge and belief, cost or pricing data submitted in writing, or specifically identified in writing if actual submission of the data is impracticable (see FAR 15.804-6(d)), to the University in support of \_\_\_\_\* are accurate, complete, and current as of \_\_\_\_\*\*.

Firm Name Title  
Date of Execution\*\*\*

\* Identify the proposal, quotation, request for price adjustment, or other submission involved.

\*\* Insert the day, month, and year when price negotiations were concluded and price agreement was reached.

\*\*\* Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the subcontract price was agreed to.

- (c) For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract change or other modification involving an amount in excess of the cost or pricing data threshold at FAR 15.804-2(a)(1) were accurate, complete, and current, DOE shall, until the expiration of 3 years from the date of final payment under this subcontract, have the right to examine those books, records, documents, papers, and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.
- (d) If the original price of this subcontract exceeds the cost or pricing data threshold at FAR 15.804-2(a)(1) or the price of any change or other modification do this subcontract is expected to exceed the cost or pricing data threshold at FAR 15.804-2(a)(1), the Subcontractor agrees to furnish the University certified cost or pricing data, using the certificate set forth in paragraph (b) above, unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.
- (e) The requirement for submission of certified cost or pricing data with respect to any change or other modification does not apply to any lower-tier subcontractor change or other modification, at any tier, where the subcontract is firm fixed-price or fixed-price with escalation unless such change or other modification result from a change or modification to the subcontract, nor does it apply to a lower-tier subcontract change or modification, at any tier, where the subcontract is not firm fixed-price or fixed-price with escalation unless the price for such change or other modification becomes reimbursable under the subcontract.
- (f) The Subcontractor agrees to insert paragraph (c) without change and the substance of paragraph (a), (b), (c), (d), (e), and (f) of this clause in each lower-tier subcontract of

hereunder in excess of the cost or pricing data threshold at FAR 15.804-2(a)(1) and in each lower-tier subcontract of the cost or pricing data threshold at FAR 15.804-2(a)(1) a change or other modification thereto in excess of the cost or pricing data threshold at FAR 15.804-2(a)(1).

- (g) If the University determines that any price, including profit or fee, negotiated in connection with this subcontract or any cost reimbursable under this subcontract was increased by any significant sums because the Subcontractor, or any lower-tier subcontractor pursuant to this clause or any lower-tier subcontract clause herein required, furnished incomplete or inaccurate cost or pricing data, then such prices or cost shall be reduced accordingly and the subcontract shall be modified in writing to reflect such reduction.
- (h) Failure of the Subcontractor and the lower-tier subcontractor to agree on any of the matters in paragraph (g) above shall be a dispute concerning a question of fact subject to the Disputes provisions of this subcontract.

## **B12, Subcontractor Cost or Pricing Data**

- (a) Before awarding any lower-tier subcontract expected to exceed the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1) when entered into, or before pricing any lower-tier subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1), the Subcontractor shall require the lower-tier subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is
  - (1) Based on adequate price competition;
  - (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (3) Set by law or regulation.
- (b) The Subcontractor shall require the lower tier subcontractor to certify in substantially the form prescribed in Subsection 15.804-4 of the FAR that, to the best of its knowledge and belief, the data submitted under paragraph (a) above were accurate, complete, and current as of the date of agreement on the negotiated price of the lower-tier subcontract or lower-tier subcontract modification.
- (c) In each lower-tier subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1) when entered into, the Subcontractor shall insert either
  - (1) The substance of this clause, including this paragraph (c), if paragraph (a) above requires submission of cost or pricing data for the lower-tier subcontract; or
  - (2) The substance of the clause entitled Subcontractor Cost or Pricing Data -Modifications.

## **B13, Subcontractor Cost or Pricing Data - Modifications**

- (a) The requirements of paragraphs (b) and (c) of this clause shall become operative only for any modification to the subcontract involving a pricing adjustment expected to exceed

the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1), and shall be limited to such modifications.

- (b) Before awarding any lower-tier subcontract expected to exceed the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1) when entered into, or pricing any lower-tier subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1), the Subcontractor shall require the lower-tier subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is
  - (1) Based on adequate price competition;
  - (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (3) Set by law or regulation.
- (c) The Subcontractor shall require the lower-tier subcontractor to certify in substantially the form prescribed in Subsection 15.804-4 of the FAR that, to the best of its knowledge and belief, the data submitted under paragraph (b) above were accurate, complete, and current as of the date of agreement on the negotiated price of the lower-tier subcontract or lower-tier subcontract modification.
- (d) The Subcontractor shall insert the substance of this clause, including this paragraph (d), in each lower-tier subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1), when entered into.

## **B14, Audit and Records- Negotiation**

- (a) As used in this clause, "records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.
- (b) *Examination of costs.* If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable subcontract, or any combination of these, the Subcontractor shall maintain and the University, or an authorized representative of the University or the Department of Energy Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this subcontract. This right of examination shall include inspection at all reasonable times of the Subcontractor's plants, or parts of them, engaged in performing the subcontract.
- (c) *Cost or pricing data.* If the Subcontractor has been required to submit cost or pricing data in connection with any pricing action relating to this subcontract, the University, or an authorized representative of the Department of Energy Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Subcontractor's records, including computations and projections, related to--
  - (1) The proposal for the subcontract, lower-tier subcontract or modification;

- (2) The discussions conducted on the proposal(s), including those related to negotiating;
  - (3) Pricing of the subcontract, lower-tier subcontract, or modification; or
  - (4) Performance of the subcontract, lower-tier subcontract or modification.
- (d) *Comptroller General--*
- (1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Subcontractor's directly pertinent records involving transactions related to this subcontract or a lower-tier subcontract hereunder.
  - (2) This paragraph may not be construed to require the Subcontractor or lower-tier subcontractor to create or maintain any record that the Subcontractor or lower-tier subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.
- (e) *Reports.* If the Subcontractor is required to furnish cost, funding, or performance reports, the University or an authorized representative of the Department of Energy Contracting Officer shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating (1) the effectiveness of the Subcontractor's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.
- (f) *Availability.* The Subcontractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this subcontract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this subcontract. In addition--
- (1) If this subcontract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and
  - (2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this subcontract shall be made available until such appeals, litigation, or claims are finally resolved.
- (g) The Subcontractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all lower-tier subcontracts under this subcontract that exceed the simplified acquisition threshold in FAR Part 13, and--
- (1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;
  - (2) For which cost or pricing data are required; or
  - (3) That require the lower-tier subcontractor to furnish reports as discussed in paragraph (c) of this clause.

The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

### **B15, Additional Paragraph (h) to Clause B14**

(For cost-reimbursement subcontracts with educational and other non-profit institutions)

- (h) The provisions of OMB Circular No. A-133, "Audits of Institutions of Higher Learning and Other Nonprofit Institutions," apply to this subcontract.

### **B16, Audit-Commercial Items**

- (a) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or any other form.
- (b) This paragraph applies to solicitations and contracts or subcontracts for commercial items that may be or have been granted an exception from submittal of cost or pricing data only under FAR 15.804- 1 (a)(2). In order to determine the accuracy of the information on prices at which the same or similar items have been sold in the commercial market, the University and authorized representatives of the DOE Contracting Officer have a right to examine such information provided by the offeror, Contractor, or subcontractor, and all records that directly relate to such information. Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the marketplace. This right shall expire two years after the date of award of the contract, or two years after the date of any modification to the contract, with respect to which this information is provided.
- (c) If the prime Contractor and each higher-tier subcontractor were required to submit cost or pricing data, the Contractor and each subcontractor shall insert the substance of this clause, including this paragraph (c), in each subcontract for which submission of cost or pricing data was required or for which an exception was granted under FAR 15.804- 1(a)(2).

### **B17, State of New Mexico Gross Receipts and Compensating Tax**

This clause applies if (1) the subcontract directs or authorizes the Subcontractor to acquire tangible personal property as a direct cost under the subcontract and title to such property passes directly to and vests in the United States upon delivery of the property by the Subcontractors, and (2) the subcontract is for services to be performed in whole or in part within New Mexico.

- (a) Within thirty days after award of the subcontract, the Subcontractor shall advise the State of New Mexico of the subcontract by registering with the State of New Mexico, Taxation and Revenue Department, Revenue Division, pursuant to the Tax Administration Act of the State of New Mexico, and shall identify the subcontract number.

- (b) The Subcontractor shall pay the New Mexico gross receipts taxes, pursuant to the Gross Receipts and Compensating Tax Act of New Mexico, assessed against the subcontract fee and costs paid for performance of the subcontract, or of any part of portion thereof, within the State of New Mexico. The allowability of any gross receipts taxes or local option taxes lawfully paid to the State of New Mexico by the Subcontractor or its lower-tier subcontractors will be determined in accordance with the Allowable Cost and Payment clause of the subcontract except as provided in paragraph (d) of this clause.
- (c) The Subcontractor shall submit applications for Nontaxable Transaction Certificates, Form CSR-3C, to the State of New Mexico Taxation and Revenue Department, Revenue Division, P.O. Box 630, Santa Fe, New Mexico, 87509. When the Type 15 Nontaxable Transaction Certificate is issued by the Revenue Division, the Subcontractor shall use these certificates strictly in accordance with the subcontract and the agreement between DOE and the New Mexico Taxation and Revenue Department.
- (d) The Subcontractor shall provide Type 15 Nontaxable Transaction Certificates to each vendor in New Mexico selling tangible personal property to the Subcontractor for use in the performance of the subcontract. Failure to provide a Type 15 Nontaxable Transaction Certificate to vendors will result in the vendor's liability for the gross receipts taxes and those taxes, which are then passed on to the Subcontractor, shall not be reimbursable as an allowable cost by the University.
- (e) The Subcontractor shall pay the New Mexico compensating user tax for any tangible personal property that is purchased pursuant to a Nontaxable Transaction Certificate if such property is not used for Federal purposes.
- (f) Out-of-state purchase of tangible personal property by the Subcontractor that would be otherwise subject to compensating tax shall be governed by the principles of this clause. Accordingly, compensating tax shall be due from the Subcontractor only if such property is not used for Federal purposes.
- (g) The University may receive information regarding the Subcontractor from the Revenue Division of the New Mexico Taxation and Revenue Department and, at the discretion of the University, may participate in any matters or proceedings pertaining to this clause or the above mentioned Agreement. This shall not preclude the Subcontractor from having its own representative nor does it obligate the University to represent its Subcontractor.
- (h) The Subcontractor agrees to insert the substance of this clause, including this paragraph (h), in each lower-tier subcontract that meets the criteria in FAR 29.401-6 (b)(1) through (3).
- (i) Paragraphs (a) through (h) of this clause shall be null and void should the Agreement referred to in paragraph (c) of this clause be terminated; provided, however, that such termination shall not nullify obligations already incurred before the date of termination.

## **B18, Rights in Data - General**

### **(a) Definitions.**

*"Computer software,"* as used in this clause, means computer programs, computer data bases, and documentation thereof.

*"Data,"* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

*"Form, fit, and function data,"* as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software, it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

*"Limited rights,"* as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) (General Provision B19) if included in this clause.

*"Limited rights data,"* as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

*"Restricted computer software,"* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications or such computer software.

*"Restricted rights,"* as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) (General Provision B20) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made a part of the subcontract, including minor modifications of such computer software.

*"Technical data,"* as used in this clause, means data (other than computer software) which are of a scientific or technical nature.

*"Unlimited rights,"* as used in this clause, meant the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of rights.*

- (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in -
  - (i) Data first produced in the performance of the subcontract;
  - (ii) Form, fit, and function data delivered under the subcontract;
  - (iii) Data delivered under this subcontract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items,

components, or processes delivered or furnished for use under the subcontract; and

- (iv) All other data delivered under the subcontract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Subcontractor shall have the right to -

- (i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of the subcontract unless provided otherwise in paragraph (d) of this clause;
- (ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause;
- (iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) of this clause; and
- (iv) Establish claim to copyright subsisting in data first produced in the performance of the subcontract to the extent provided in subparagraph (c)(1) of this clause.

(c) *Copyright.*

- (1) *Data first produced in the performance of the subcontract.* Unless provided otherwise in paragraph (d) of this clause, the Subcontractor may establish, without prior approval of the University, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of the subcontract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of the DOE Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of the subcontract. (Requests for DOE Contracting Officer's permission are to be submitted through the University Contract Administrator.) When claim to copyright is made, the Subcontractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including subcontract number) to the data when such data are delivered to the University, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Subcontractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Subcontractor grants to the Government and others acting in its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted computer software to reproduce, prepare derivative works, or perform publicly or display publicly by or on behalf of the Government.



- (2) *Data not first produced in the performance of the subcontract.* The Subcontractor shall not, without prior written permission of the DOE Contracting Officer, incorporate in data delivered under the subcontract any data not first produced in the performance of the subcontract and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Subcontractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause; *provided*, however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) of this clause if included in the subcontract or as otherwise may be provided in a collateral agreement incorporated in or made part of the subcontract.
  - (3) *Removal of copyright notices.* The University and the Government agree not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.
- (d) *Release, publication and use of data.*
- (1) The Subcontractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of the subcontract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in the subcontract.
  - (2) The Subcontractor agrees that to the extent it receives or is given access to data necessary for the performance of the subcontract which contains restrictive markings, the Subcontractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the University after conferring with the DOE Contracting Officer.
  - (3) The Subcontractor agrees not to establish claim to copyright in computer software first produced in the performance of the subcontract without prior written permission of the DOE Contracting Officer. (Requests for DOE Contracting Officer's permission are to be submitted through the University Contract Administrator.) When such permission is granted, the DOE Contracting Officer, through the University shall specify appropriate terms to assure dissemination of the software. The Subcontractor shall promptly deliver to the University or to the Patent Counsel designated by the DOE Contracting Officer a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled, and other terms pertaining to the computer software to which claim to copyright is made.
- (e) *Unauthorized marking of data.*
- (1) Notwithstanding any other provisions of the subcontract concerning inspection or acceptance, if any data delivered under the subcontract are marked with the notices specified in subparagraph (g)(2) or (g)(3) of this clause, or if such data bears any other restrictive or limiting markings not authorized by the subcontract, the University may at any time either return the data to the Subcontractor, or with the concurrence of the DOE Contracting Officer, cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

- (i) The University shall make written inquiry to the Subcontractor affording the Subcontractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;
  - (ii) If the Subcontractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the University for good cause shown), the University shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.
  - (iii) If the Subcontractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (e)(1)(i) of this clause, the University shall consider such written justification and determine whether or not the markings are to be canceled or ignored. If the University determines that the markings are authorized, the Subcontractor shall be so notified in writing. If the University determines, with the concurrence of the DOE Contracting Officer, that the markings are not authorized, the University shall furnish the Subcontractor a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Subcontractor files suit in a court of competent jurisdiction within 90 days of receipt of the University's decision. The University shall continue to abide by the markings under this subdivision (e)(1)(ii) until final resolution of the matter either by the University's determination becoming final (in which instance the University shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.
- (2) The time limits in the procedure set forth in subparagraph (e)(1) of this clause may be modified in accordance with DOE regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.
  - (3) This paragraph (e) does not apply if this subcontract is for a major system or for support of a major system by a civilian agency other than NASA and the U.S. Coast Guard agency subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949.
  - (4) Except to the extent the University's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Subcontractor is not precluded by this paragraph (e) from bringing a claim under the Disputes clause of the subcontract that may arise as the result of the University removing or ignoring authorized markings on data delivered under the subcontract.
- (f) *Omitted or incorrect markings.*
    - (1) Data delivered to the University without either the limited rights or restricted rights notice as authorized by paragraph (g) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the University and the Government assume no liability for the disclosure, use, or reproduction of such data. However, to the

extent the data has not been disclosed without restriction outside the University or the Government, the Subcontractor may request, within 6 months (or a longer time approved by the University for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Subcontractor's expense, and the University may agree to do so if the Subcontractor-

- (i) Identifies the data to which the omitted notice is to be applied;
- (ii) Demonstrates that the omission of the notice was inadvertent;
- (iii) Establishes that the use of the proposed notice is authorized; and
- (iv) Acknowledges that the University and the Government have no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice resulting from the omission of the notice.

- (2) The University may also (i) permit correction at the Subcontractor's expense of incorrect notices if the Subcontractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(g) *Protection of limited rights data and restricted computer software.*

- (1) When data other than that listed in subdivisions (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under the subcontract and qualify as either limited rights data or restricted computer software, if the Subcontractor desires to continue protection of such data, the Subcontractor shall withhold such data and not furnish them to the University under the subcontract. As a condition to this withholding, the Subcontractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery to the University are to be treated as limited rights data and not restricted computer software.

- (h) *Subcontracting.* The Subcontractor has the responsibility to obtain from its lower-tier subcontractors all data and rights therein necessary to fulfill the Subcontractor's obligations to the University under the subcontract. If a lower-tier subcontractor refuses to accept terms affording the University and the Government such rights, the Subcontractor shall promptly bring such refusal to the attention of the University and not proceed with lower-tier subcontract award without further authorization.

- (i) *Relationship to patents.* Nothing contained in this clause shall imply a license to the University or Government under any patent or be construed as affecting the scope of any license of other right otherwise granted to the University or the Government.

- (j) The Subcontractor agrees, except as may be otherwise specified in the subcontract for specific data items listed as not subject to this paragraph, that the University and the Government may, up to three years after acceptance of all items to be delivered under the subcontract, inspect at the Subcontractor's facility any data withheld pursuant to paragraph (g)(1) of this clause, for purposes of verifying the Subcontractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Subcontractor whose data are to be inspected demonstrates to the DOE Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the DOE Contracting Officer shall designate an alternate inspector.

## **B19, Additional Paragraph (g)(2) to Clause B18, Rights in Data- General**

- (2) Notwithstanding subparagraph (g)(1) of this clause, the subcontract may identify and specify the delivery of limited rights data, or the University may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Subcontractor may affix the following "Limited Rights Notice" to the data and the University will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with such Notice:

### **LIMITED RIGHTS NOTICE**

(a) These data are submitted with limited rights under Subcontract No. \_\_\_\_\_ (and lower-tier subcontract, if appropriate). These data may be reproduced and used by the University and the Government with the express limitation that they will not, without written permission of the Subcontractor, be used for purposes of manufacture nor disclosed outside the University or the Government; except that the University or the Government may disclose these data outside the University or the Government for the following purposes, if any; provided that the University and the Government makes such disclosure subject to prohibition against further use and disclosure:\*

(b) This Notice shall be marked on any reproduction of these data in whole or in part.

(End of Notice)

\*The purposes shall be identified in the subcontract schedule when this clause is used.

## **B20, Additional Paragraph (g)(3) to Clause B18, Rights in Data - General**

- (3) (i) Notwithstanding subparagraph (g)(1) of this clause, the subcontract may identify and specify the delivery of restricted computer software, or the University may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Subcontractor may affix the following "Restricted Rights Notice" to the computer software, the University will thereafter treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the Notice:

### **RESTRICTED RIGHTS NOTICE**

(a) This computer software is submitted with restricted rights under Subcontract No. \_\_\_\_\_ (and lower-tier subcontract

\_\_\_\_\_ if appropriate). It may not be used, reproduced, or disclosed by the University or the Government except as provided in paragraph (b) of this Notice or as otherwise expressly stated in the subcontract.

(b) This computer software may be - (1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred; (2) Used or copied for use in a backup computer if any computer for which it was acquired is inoperative; (3) Reproduced for safekeeping (archives) or backup purposes; (4) Modified, adapted, or combined with other computer software, *provided* that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software are made subject to the same restricted rights; (5) Disclosed to and reproduced for use by support service Contractors or Subcontractors in accordance with subparagraphs (b)(1) through (4) of this clause, provided the University or the Government makes such disclosure or reproduction subject to these restricted rights; and (6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copy-righted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated or incorporated in, the subcontract.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of Notice)

- (ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

#### RESTRICTED RIGHTS NOTICE SHORT FORM

Use, reproduction, or disclosure is subject to restrictions set forth in Subcontract No. \_\_\_\_\_ (and lower-tier subcontract \_\_\_\_\_, if appropriate) with \_\_\_\_\_ (name of Subcontractor and lower-tier subcontractor).

(End of Notice)

- (iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the University and the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Subcontractor includes the following statement with such copyright notice:

## **B21, Alternate Paragraph (c)(1) to Clause B18, Rights In Data - General**

*This paragraph may only be used in subcontracts for basic or applied research to be performed solely by universities and colleges.*

(1) *Data first produced in the performance of the subcontract.* Except as otherwise specifically provided in the subcontract, the Subcontractor may establish claim to copyright subsisting in any data first produced in the performance of this subcontract. When claim to copyright is made, the Subcontractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including subcontract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Subcontractor grants to the Government and others working on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Subcontractor grants to the Government and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

## **B22, Additional Data Requirements**

(This clause does not apply if the subcontract is for the conduct of basic or applied research as set out elsewhere in the subcontract to be performed solely by a college or university and the estimated cost is not in excess of \$500,000.)

- (a) In addition to the data as defined in the Rights in Data - General clause or other equivalent included in the subcontract and specified elsewhere in the subcontract to be delivered, the University may, at any time during subcontract performance or within a period of three years after acceptance of all items to be delivered under the subcontract, order any data first produced or specifically used in the performance of the subcontract.
- (b) The Rights in Data - General clause or other equivalent included in the subcontract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Subcontractor to deliver any data the withholding of which is authorized by the Rights in Data or other equivalent clause of the subcontract or data that are specifically identified in the subcontract as not subject to this clause.
- (c) When data are to be delivered under this clause, the Subcontractor will be compensated for converting the data into the prescribed form for reproduction and for delivery.
- (d) The University with the concurrence of the DOE Contracting Officer may release the Subcontractor from the requirements of this clause for specifically identified data items at any time during the three-year period set forth in paragraph (a) above.

## B23, Rights in Data - Special Works

- (a) **Definition.** *"Data,"* as used in this clause, means recorded information regardless of form or characteristic, such as writings, sound recordings, pictorial reproductions, drawings, or other graphic representations, and works of similar nature (whether or not copyrighted) that are specified to be delivered under the subcontract. The term includes data such as management studies and data produced under support services subcontracts but does not include financial reports, cost analyses, and other information incidental to subcontract administration.
- (b) All data first produced or composed in the course of or under the subcontract shall be the sole property of the Government. Except with the prior written permission of the DOE Contracting Officer, the Subcontractor agrees not to assert any rights at common law or in equity or to establish any claim to statutory copyright in such data. The Subcontractor shall not publish or reproduce such data in whole or in part or in any manner or form, or authorize others so to do without the written consent of the DOE Contracting Officer or until such time as the University or the Government may have released such data to the public.
- (c) The Subcontractor hereby grants to or will obtain for the Government a royalty-free, nonexclusive, and irrevocable license throughout the world
  - (1) To publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, any and all data that are not first produced or composed in the performance of the subcontract but that are incorporated in the work furnished under the subcontract; and
  - (2) To authorize others to do so.
- (d) The Subcontractor shall indemnify and save and hold harmless the University and the Government and its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses
  - (1) For violation of proprietary rights, copyrights, or rights or privacy, arising out of the publication, translation, reproduction, delivery, performance, use, or disposition of any data furnished under the subcontract; or
  - (2) Based upon libelous, defamatory, or other unlawful matter contained in such data.
- (e) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

## B24, Rights in Data - Existing Works

- (a) Except as otherwise provided in the subcontract, the Subcontractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and

display publicly, by or on behalf of the Government, for all material or subject matter called for under the subcontract, or for which this clause is specifically made applicable.

- (b) The Subcontractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expensed, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under the subcontract; or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Subcontractor as soon as practicable of any claim or suit, affords the Subcontractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Subcontractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Subcontractor by the Government or University and incorporated in data to which this clause applies.

## **B25, Rights in Proposal Data**

Except for data contained on pages \* , it is agreed that as a condition of award of the subcontract and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the "Rights in Data - General" clause contained in the subcontract) in and to the technical data contained in the proposal dated \* , upon which this subcontract is based.

\*Identified in Section F of the Schedule.

## **B26, Technical Data Certification, Revision, and Withholding of Payment - Major Systems**

- (a) *Scope of clause.* This clause shall apply to all technical data (as defined in the Rights in Data - General clause included in the subcontract) that have been specified in the subcontract as being subject to this clause. It shall apply to all such data delivered, or required to be delivered, at any time during subcontract performance or within 3 years after acceptance of all items (other than technical data) delivered under the subcontract unless a different period is set forth therein. The University may release the Subcontractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.
- (b) *Technical data certification.*
- (1) All technical data that are subject to this clause shall be accompanied by the following certification upon delivery:

### **TECHNICAL DATA CERTIFICATION**

The Subcontractor, \_\_\_\_\_, hereby certifies that to the best of its knowledge and belief the technical data delivered herewith under Government contract No. W-7405-ENG-36 and subcontract No. \_\_\_\_\_ are complete, accurate, and comply with the requirements of the subcontract concerning such technical data.



(End of certification)

- (2) The Government and University shall rely on the certification set out in subparagraph (b)(1) of this clause in accepting delivery of the technical data, and in consideration thereof may, at any time during the period covered by this clause, request correction of any deficiencies which are not in compliance with subcontract requirements. Such corrections shall be made at the expense of the Subcontractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data - General clause included in the subcontract.
- (c) *Technical data revision.* The Subcontractor also agrees, at the request of the University, to revise technical data that are subject to this clause to reflect engineering design changes made during the performance of the subcontract and affecting the form, fit, and function of any item (other than technical data) delivered under the subcontract. The Subcontractor may submit a request for an equitable adjustment to the terms and conditions of the subcontract for any revisions to technical data made pursuant to this paragraph.
- (d) *Withholding of payment.*
  - (1) At any time before final payment under the subcontract the University may, in the Government's and the University's interest, withhold payment until a reserve not exceeding \$100,000 or 5 percent of the amount of the subcontract, whichever is less, if in the University's opinion respecting any technical data that are subject to the clause, the Subcontractor fails to -
    - (i) Make timely delivery of such technical data as required by the subcontract.
    - (ii) Provide the certification required by subparagraph (b)(1) of this clause;
    - (iii) Make the corrections required by subparagraph (b)(2) of this clause; or
    - (iv) Make revisions requested under paragraph (c) of this clause.
  - (2) Such reserve or balance shall be withheld until the University has determined that the Subcontractor has delivered the data and/or has made the required corrections or revisions. Withholding shall not be made if the failure to make timely delivery, and/or the deficiencies relating to delivered data, arose out of causes beyond the control of the Subcontractor and without the fault or negligence of the Subcontractor.
  - (3) The University may decrease or increase the sums withheld up to the sums authorized in subparagraph (d)(1) of this clause. The withholding of any amount under this paragraph, or the subsequent payment thereof, shall not be construed as a waiver of any Government or University rights.

## **B27, Major System - Minimum Rights**

Notwithstanding any other provision of this subcontract, the Government shall have unlimited rights in any technical data, other than computer software, developed in the performance of this subcontract and relating to a major system or supplies for a major system procured or to be procured by the Government or the University, to the extent that delivery of such technical data is required as an element of performance under the subcontract. The rights of the Government under

this clause are in addition do and not in lieu of its rights under the other provisions of the subcontract.

## **B28, Authorization and Consent**

- (a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of the subcontract or any lower-tier subcontract.
- (b) The Subcontractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all lower-tier subcontracts at any tier for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed the simplified acquisition threshold); however, omission of this clause from any lower-tier subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

## **B29, Authorization and Consent**

- (a) The Government authorizes and consents to all use and manufacture, informing the subcontract or any lower-tier subcontract at any tier, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the University under the subcontract or (2) used in machinery, tools, or methods whose use is necessarily results from compliance by the Subcontractor or a lower-tier subcontractor with (i) specifications or written provisions forming a part of the subcontract or (ii) specific written instructions given by the University directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in the subcontract or any lower-tier subcontract thereunder, and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.
- (b) The Subcontractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all lower-tier subcontracts at any tier for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed the simplified acquisition threshold); however, omission of this clause from any lower-tier subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

## **B30, Waiver of Indemnity**

Any provision or clause of the subcontract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in performing the subcontract, of any invention covered by the United States patents identified in the schedule and waives indemnification by the Subcontractor regarding such patents.

## **B31, Patent Indemnity**

- (a) The Subcontractor shall indemnify the University and the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of goods, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under the subcontract, or out of the use or disposal by or for the account of the Government of such goods or construction work.
- (b) This indemnity shall not apply unless the Subcontractor shall have been informed as soon as practicable by the University and/or the Government of the suit or action alleging such infringement and shall have been given such opportunity that is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to
  - (1) an infringement resulting from compliance with specific written instructions of the University directing a change in the goods to be delivered or in the material or equipment to be used, or directing a manner of performance of the subcontract not normally used by the Subcontractor;
  - (2) an infringement resulting from addition to or change in goods furnished or construction work performed that was made subsequent to delivery or performance; or
  - (3) a claimed infringement that is unreasonably settled without the consent of the Subcontractor, unless required by final decree of a court of competent jurisdiction.
- (c) This patent indemnification shall cover the items identified in Section F of the subcontract schedule.

## **B32, Classified Inventions**

- (a) The Subcontractor shall not file or cause to be filed on any invention or discovery conceived or first actually reduced to practice in the course of or under the subcontract in any country other than the United States, an application or registration for a patent without first obtaining written approval of the Department of Energy through the University.
- (b) When filing a patent application in the United States on any invention or discovery conceived of or first actually reduced to practice in the course of or under the subcontract, the subject matter of which is classified for reasons of security, the Subcontractor shall observe all applicable security regulations covering the transmission of classified subject matter. When transmitting the patent application to the United States Patent and Trademark Office, the Subcontractor shall by separate letter identify by agency and number the contract(s) or subcontract(s) which require security classification markings to be placed on the application.
- (c) The substance of this clause shall be included in lower-tier subcontracts which cover or are likely to cover classified subject matter.

## B33, Patent Rights - Retention by The Subcontractor (Short Form)

(a) **Definitions.**

- (1) *"Invention"* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).
- (2) *"Made"* when used in relation to any invention means the conception of first actual reduction to practice of such invention.
- (3) *"Nonprofit organization"* means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501 (c)) and exempt from taxation under section 501 (a) of the Internal Revenue Code (26 U.S.C. 501 (a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.
- (5) *"Practical application"* means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.
- (6) *"Small business firm"* means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.
- (7) *"Subject invention"* means any invention of the subcontractor conceived or first actually reduced to practice in the performance of work under the subcontract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of subcontract performance.
- (8) *"Agency licensing regulations"* and "agency regulations concerning the licensing of Government-owned inventions" mean the Department of Energy patent licensing regulations at 10 CFR Part 781.

(b) Allocation of principal rights. The Subcontractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Subcontractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention disclosure, election of title, and filing of patent application by Subcontractor.

- (1) The Subcontractor will disclose each subject invention to the Department of Energy (DOE) within 2 months after the inventor discloses it in writing to Subcontractor personnel responsible for patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the subcontract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the DOE, the Subcontractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor.
  - (2) The Subcontractor will elect in writing whether or not to retain title to any such invention by notifying DOE within 2 years of disclosure to DOE. However, in any case where publication, on sale or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.
  - (3) The Subcontractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, or sale, or public use. The Subcontractor will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.
  - (4) Requests for extension of the time for disclosure, election, and filing under subparagraphs (c)(1), (2), and (3) of this clause may, at the discretion of the agency, be granted.
- (d) Conditions when the Government may obtain title. The Subcontractor will convey to the Federal agency, upon written request, title to any subject invention--
- (1) If the Subcontractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Subcontractor to disclose or elect within the specified times.
  - (2) In those countries in which the Subcontractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Subcontractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the Federal agency, the Subcontractor shall continue to retain title in that country.

- (3) In any country in which the Subcontractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.
- (e) Minimum rights to Subcontractor and protection of the Subcontractor right to file.
  - (1) The Subcontractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Subcontractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Subcontractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Subcontractor is a party and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the subcontract was awarded. The license is transferable only with the approval of the Federal agency, except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.
  - (2) The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Subcontractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.
  - (3) Before revocation or modification of the license, DOE will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable regulations in 37 CFR Part 404 and agency regulations concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.
- (f) Subcontractor action to protect the Government's interest.
  - (1) The Subcontractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Subcontractor elects to retain title, and (ii) convey title to DOE when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection throughout the world in that subject invention.
  - (2) The Subcontractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Subcontractor each subject invention made under subcontract in order that the Subcontractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary

to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (c)(1) of this clause. The Subcontractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

- (3) The Subcontractor will notify DOE of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.
- (4) The Subcontractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the subcontract) issued by the University of California under Contract W-7405-ENG-36 awarded by the United States Department of Energy. The Government has certain rights in the invention."

(g) Lower-tier Subcontracts.

- (1) The Subcontractor will include this clause, suitably modified to identify the parties, in all lower-tier subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The lower-tier subcontractor will retain all rights provided for the Subcontractor in this clause, and the Subcontractor will not, as part of the consideration for awarding the lower-tier subcontract, obtain rights in the lower-tier subcontractor's subject inventions.
- (2) The subcontractor shall include in all other lower-tier subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights clause at DEAR 952.227-13.
- (3) In the case of lower-tier subcontracts, at any tier, DOE, lower-tier subcontractor, and the Subcontractor agree that the mutual obligations of the parties created by this clause constitute a contract between the lower-tier subcontractor and DOE with respect to the matters covered by the clause: provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph(j) of this clause.

- (h) Reporting on utilization of subject inventions. The Subcontractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received, by the Subcontractor, and such other data and information as DOE may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by that agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Subcontractor.

- (i) Preference for United States industry. Notwithstanding any other provision of this clause, the Subcontractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Subcontractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.
  
- (j) March-in rights. The Subcontractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the Subcontractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that--
  - (1) Such action is necessary because the Subcontractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
  - (2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;
  - (3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Subcontractor, assignee, or licensees; or
  - (4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.
  
- (k) Special provisions for subcontracts with nonprofit organizations. If the Subcontractor is a nonprofit organization, it agrees that--
  - (1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Subcontractor;
  - (2) The Subcontractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;
  - (3) The balance of any royalties or income earned by the Subcontractor with respect to subject inventions, after payment of expenses (including payments to



inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and

- (4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Subcontractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Subcontractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the contractor. However, the Subcontractor agrees that the Secretary of Commerce may review the Subcontractor's licensing program and decisions regarding small business applicants, and the Subcontractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Subcontractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(4).

(l) **Communications.**

- (1) The Subcontractor shall direct any notification disclosure, or request to DOE provided for in this clause to the DOE patent counsel assisting the DOE contracting activity, with a copy of the communication to the University.
- (2) Each exercise of discretion or decision provided for in this clause, except subparagraph (k)(4), is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.
- (3) Upon request of the DOE Patent Counsel or the University, the Subcontractor shall provide any or all of the following:
  - (i) a copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the Subcontractor has applied for a patent;
  - (ii) a report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or
  - (iii) a report, prior to close-out of the subcontract, listing all subject inventions or stating that there were none.

## **B34, Patent Rights - Acquisition by The Government**

(a) **Definitions.**

*"Invention"*, as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

*"Practical application"*, as used in this clause, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

*"Subject invention"*, as used in this clause, means any invention of the Subcontractor conceived or first actually reduced to practice in the course of or under the subcontract.

*"Patent Counsel"*, as used in this clause, means the Department of Energy Patent Counsel assisting the procuring activity.

*"DOE patent waiver regulations"*, as used in this clause, means the Department of Energy patent waiver regulations at 41 CFR 99.109-6 or successor regulations.

*"Agency licensing regulations"* and *"applicable agency licensing regulations"*, as used in this clause, mean the Department of Energy patent licensing regulations at 10 CFR Part 781.

(b) Allocations of principal rights.

- (1) Assignment to the Government. The Subcontractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Subcontractor under subparagraph (b)(2) and paragraph (d) of this clause.
- (2) Greater rights determinations.
  - (i) The Subcontractor, or an employee-inventor after consultation with the Subcontractor, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulations. A request for a determination of whether the Subcontractor or the employee-inventor is entitled to acquire such greater rights must be submitted to the Patent Counsel with a copy to the University at the time of the first disclosure of the invention pursuant to subparagraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the University for good cause shown in writing by the Subcontractor. Each determination of greater rights under the subcontract shall be subject to paragraph (c) of this clause, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.
  - (ii) Within two (2) months after the filing of a patent application, the Subcontractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and, promptly upon issuance of a patent, provide the patent number and issue date for any subject invention in any country for which the Subcontractor has been granted title or the right to file and prosecute on behalf of the United States by the Department of Energy.

- (iii) Not less than thirty (30) days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.
  - (iv) Upon request, the Subcontractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.
- (c) Minimum rights acquired by the Government.
  - (1) With respect to each subject invention to which the Department of Energy grants the Subcontractor principal or exclusive rights, the Subcontractor agrees as follows:
    - (i) The Subcontractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).
    - (ii) The Subcontractor agrees that with respect to any subject invention in which DOE has granted it title, DOE has the right in accordance with the procedures in the DOE patent waiver regulations to require the Subcontractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if it determines that--
      - (A) Such action is necessary because the Subcontractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
      - (B) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Subcontractor, assignee, or their licensees;
      - (C) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Subcontractor, assignee, or licensees; or
      - (D) Such action is necessary because the agreement required by paragraph (i) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.
    - (iii) The Subcontractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its

licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Subcontractor, and such other data and information as DOE may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceedings undertaken by that agency in accordance with subparagraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Subcontractor, its licensee, or assignee to be privileged and confidential and is so marked, the Department of Energy agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government.

- (iv) The Subcontractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.
- (v) The Subcontractor agrees to provide for the Government's paid-up license pursuant to subparagraph (c)(1)(i) of this clause in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subparagraph (c)(1)(ii) of this clause, and for the reporting of utilization information as required by subparagraph (c)(1)(iii) of this clause, whenever the instrument transfers principal or exclusive rights in a subject invention. (2) Nothing contained in this paragraph (c) shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(d) Minimum rights to the Subcontractor.

- (1) The Subcontractor is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Subcontractor fails to disclose the subject invention within the times specified in subparagraph (e)(2) of this clause. The Subcontractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a part and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the subcontract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.
- (2) The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Subcontractor, its licensees,

or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

- (3) Before revocation or modification of the license, DOE will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable agency licensing regulations and 37 CFR Part 404 concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.
- (4) The Subcontractor may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the conditions in subparagraphs (d)(4)(i) through (d)(4)(vii) of this clause. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to the University. DOE approval, if given, will be based on a determination that this would best serve the national interest.
  - (i) The recipient of such rights, when specifically requested by DOE, and three years after issuance of a foreign patent disclosing the subject invention, shall furnish DOE a report stating:
    - (A) The commercial use that is being made, or is intended to be made, of said invention, and
    - (B) The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.
  - (ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary of Energy or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.
  - (iii) If noted elsewhere in this subcontract as a condition of the grant of an advance waiver of the Government's title to inventions under this subcontract, or, if no advance waiver was granted but a waiver of the Government's title to an identified invention is granted pursuant to subparagraph (b)(2) of this clause upon a determination by the Secretary of Energy that it is in the Government's best interest, this license shall include the right of the Government to sublicense foreign governments pursuant to any existing or future treaty or agreement with such foreign governments.
  - (iv) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right to terminate the foreign patent rights granted in this subparagraph (d)(4) in whole or in part unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee that effective steps

necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.

- (v) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right, commencing four years after foreign patent rights are accorded under this subparagraph (d)(4), to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:
    - (A) If the Secretary of Energy or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Secretary or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or
    - (B) Unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.
  - (vi) If the Subcontractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures for such period of time as specified by Patent Counsel, but in no event shall the Government or its employees be liable for any publication thereof
  - (vii) Subject to the license specified in subparagraphs (d)(1), (2), and (3) of this clause, the Subcontractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the Subcontractor or inventor fails to have a patent application filed in a timely manner or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the Subcontractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.
- (e) Invention identification, disclosures, and reports.
- (1) The Subcontractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Subcontractor personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under the subcontract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as

are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Subcontractor shall furnish the University a description of such procedures for evaluation and for determination as to their effectiveness.

- (2) The Subcontractor shall disclose each subject invention to the DOE Patent Counsel with a copy to the University within 2 months after the inventor discloses it in writing to Subcontractor personnel responsible for patent matters or, if earlier, within 6 months after the Subcontractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Contractor. The disclosure to DOE shall be in the form of a written report and shall identify the subcontract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Subcontractor shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Subcontractor contends in writing at the time the invention is disclosed that it was not so made.
- (3) The Subcontractor shall furnish the University the following:
  - (i) Interim reports every 12 months (or such longer period as may be specified by the University) from the date of the subcontract, listing subject inventions during that period, and certifying that all subject inventions have been disclosed (or that there are not such inventions) and that the procedures required by subparagraph (c)(1) of this clause have been followed.
  - (ii) A final report, within 3 months after completion of the subcontracted work listing all subject inventions or certifying that there were no such inventions, and listing all lower-tier subcontracts at any tier containing a patent rights clause or certifying that there were no such subcontracts.
- (4) The Subcontractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Subcontractor each subject invention made under subcontract in order that the Subcontractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (e)(2) of this clause.

- (5) The Subcontractor agrees, subject to FAR 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.
- (f) Examination of records relating to inventions.
  - (1) The University or DOE shall, until 3 years after final payment under the subcontract, have the right to examine any books, (including laboratory notebooks), records, and documents of the Subcontractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under the subcontract to determine whether--
    - (i) Any such inventions are subject inventions;
    - (ii) The Subcontractor has established and maintains the procedures required by subparagraphs (e)(1) and (4) of this clause;
    - (iii) The Subcontractor and its inventors have complied with the procedures.
  - (2) If the University or DOE learns of an unreported Subcontractor invention which the University or DOE believes may be a subject invention, the Subcontractor may be required to disclose the invention to DOE for a determination of ownership rights.
  - (3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.
- (g) Withholding of payment (NOTE: This paragraph does not apply to lower-tier subcontracts).
  - (1) Any time before final payment under the subcontract, the University may, in the Government's interest, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the University's opinion, the Subcontractor fails to--
    - (i) Convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this clause.
    - (ii) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to subparagraph (e)(1) of this clause;
    - (iii) Disclose any subject invention pursuant to subparagraph (e)(2) of this clause;
    - (iv) Deliver acceptable interim reports pursuant to subparagraph (e)(3)(i) of this clause; or
    - (v) Provide the information regarding subcontracts pursuant to subparagraph (h)(4) of this clause.



- (2) Such reserve or balance shall be withheld until the University has determined that the Subcontractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.
  - (3) Final payment under the subcontract shall not be made before the Subcontractor delivers to the University all disclosures of subject inventions required by subparagraph (e)(2) of this clause, and acceptable final report pursuant to subparagraph (e)(3)(ii) of this clause, and the Patent Counsel has issued a patent clearance certification to the University.
  - (4) The University may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the subcontract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any University or Government rights.
- (h) Subcontracts.
- (1) The Subcontractor shall include the clause at 48 CFR 952.227-11 (suitably modified to identify the parties) in all lower-tier subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the subcontract is subject to an Exceptional Circumstances Determination by DOE. In all other lower-tier subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Subcontractor shall include this clause (suitably modified to identify the parties). The Subcontractor shall not, as part of the consideration for awarding the lower-tier subcontract, obtain rights in the lower-tier subcontractor's subject inventions.
  - (2) In the event of a refusal by a prospective lower-tier subcontractor to accept such a clause the Subcontractor--
    - (i) Shall promptly submit a written notice to the University setting forth the lower-tier subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and
    - (ii) Shall not proceed with such lower-tier subcontract without the written authorization of the University.
  - (3) In the case of lower-tier subcontracts at any tier, DOE, the University, the lower-tier subcontractor, and Subcontractor agree that the mutual obligations of the parties created by this clause constitute a contract between the lower-tier subcontractor and DOE with respect to those matters covered by this clause.
  - (4) The Subcontractor shall promptly notify the University in writing upon the award of any lower-tier subcontract at any tier containing a patent rights clause by identifying the lower-tier subcontractor, the applicable patent rights clause, the work to be performed under the lower-tier subcontract, and the dates of award and estimated completion. Upon request of the University, the Subcontractor shall furnish a copy of such lower-tier subcontract, and, no more frequently than annually, a listing of the lower-tier subcontracts that have been awarded.

- (5) The Subcontractor shall identify all subject inventions of the lower-tier subcontractor of which it acquires knowledge in the performance of this subcontract and shall notify the Patent Counsel, with a copy to the University, promptly upon identification of the inventions.
- (i) Preference United States industry. Unless provided otherwise, no Subcontractor that receives title to any subject invention and no assignee of any such Subcontractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government upon a showing by the Subcontractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.
- (j) Atomic energy.
  - (1) No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of or under the subcontract.
  - (2) Except as otherwise authorized in writing by the University, the Subcontractor will obtain patent agreements to effectuate the provisions of subparagraph (e)(1) of this clause from all persons who perform any part of the work under the subcontract, except nontechnical personnel, such as clerical employees and manual laborers.
- (k) Background Patents.
  - (1) Background Patent means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the Subcontractor at any time through the completion of the subcontract:
    - (i) Which the Subcontractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and
    - (ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under the subcontract.
  - (2) The Subcontractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of the subcontract by or for the Government in research, development, and demonstration work only.
  - (3) The Subcontractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of the subcontract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Subcontractor believes that exclusive rights are necessary to achieve expeditious commercial

development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Subcontractor.

- (4) Notwithstanding subparagraph (k)(3) of this clause, the Subcontractor shall not be obligated to license any background patent if the Subcontractor demonstrates to the satisfaction of the Secretary of Energy or designee that:
  - (i) a competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or
  - (ii) the Subcontractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.
- (l) Publication. It is recognized that during the course of the work under the subcontract, the Subcontractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under the subcontract. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Subcontractor, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.
- (m) Forfeiture of rights in unreported subject inventions.
  - (1) The Subcontractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Subcontractor fails to report to Patent Counsel within six months after the time the Subcontractor:
    - (i) Files or causes to be filed a United States or foreign patent application thereon; or
    - (ii) Submits the final report required by subparagraph (e)(2)(ii) of this clause, whichever is later.
  - (2) However, the Subcontractor shall not forfeit rights in a subject invention if, within the time specified in subparagraph (m)(1) of this clause, the Subcontractor:
    - (i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the subcontract and delivers the decision to Patent Counsel, with a copy to the University; or
    - (ii) Contending that the invention is not a subject invention, the Subcontractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy to the University; or
    - (iii) Establishes that the failure to disclose did not result from the Subcontractor's fault or negligence.

- (3) Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes clause of this subcontract), the Subcontractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (m) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

## **B35, Classification**

In the performance of the work under the subcontract, the Subcontractor shall ensure that an Authorized Original Classifier or Derivative Classifier shall assign classifications to all documents, material, and goods originated or generated under the subcontract in accordance with classification regulations and guidance furnished to the Subcontractor by the University. Every lower-tier subcontract and purchase order issued hereunder involving the origination or generation of classified documents, material, or goods shall include a provision to the effect that in the performance of such subcontract or purchase order, the lower-tier subcontractor or supplier shall ensure that an Authorized Original Classifier or Derivative Classifier shall assign classifications to all such documents, materials, and goods in accordance with classification regulations and guidance furnished to such lower-tier subcontractor or supplier by the Subcontractor.

## **B36, Foreign Ownership, Control, or Influence Over Subcontractor**

- (a) For purposes of this clause, a foreign interest is defined as any of the following:
  - (1) A foreign government or foreign government agency;
  - (2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;
  - (3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S., that is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person; or
  - (4) Any person who is not a U.S. citizen.
- (b) Foreign ownership, control, or influence (FOCI) means the situation where the degree of ownership, control, or influence over a Subcontractor by a foreign interest is such that a reasonable basis exists for concluding that the compromise of classified information or a significant quantity of special nuclear material as defined in 10 CFR Part 710, may result.
- (c) For purposes of this clause "Subcontractor" means any subcontractor at any tier.
- (d) The Subcontractor shall immediately provide the University written notice of any changes in the extent and nature of FOCI over the Subcontractor that would affect the answers to the questions in the Certification submitted for the solicitation that resulted in the subcontract. Further, notice of changes in ownership or control that are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the University.

- (e) In those cases where a Subcontractor has changes involving FOCI, the DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, the DOE shall consider proposals made by the Subcontractor to avoid or mitigate foreign influences.
- (f) If the DOE at any time determines that the Subcontractor is or is potentially subject to FOCI, the Subcontractor shall comply with such instructions that the University shall provide in writing to safeguard any classified information or significant quantity of special nuclear material.
- (g) The Subcontractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph (g), in all lower-tier subcontracts under the subcontract that will require access to classified information or a significant quantity of special nuclear material. The Subcontractor shall also require such lower-tier subcontractors to submit a completed certification required in DEAR 952.204-73 and covered in University Form 812 before award of a lower-tier subcontract. Information to be provided by a lower-tier subcontractor pursuant to this clause will be submitted to the University.
- (h) Information submitted by a Subcontractor as required pursuant to this clause shall be treated by the University and the DOE to the extent permitted by law as business or financial information submitted in confidence to be used solely for purposes of evaluating FOCI.
- (i) The requirements of this clause are in addition to the requirement that a Subcontractor obtain and retain the security clearances required by the subcontract. This clause shall not operate as a limitation on the University's or the DOE's rights, including the University's right to terminate the subcontract.
- (j) The University may terminate the subcontract for default if
  - (1) The Subcontractor fails to meet obligations imposed by this clause, e.g., provide the information required by this clause, comply with the University's instructions about safeguarding classified information, or make this clause apply to lower-tier subcontractors; or
  - (2) In the University's judgment, the Subcontractor creates a FOCI situation to avoid performance or a termination for default. (The University may terminate the subcontract for convenience if the Subcontractor becomes subject to FOCI and for reasons other than avoidance of performance of the subcontract cannot or chooses not to avoid or mitigate the FOCI problem.)

## **B37, Sensitive Foreign Nations Controls**

- (a) In connection with any activities in the performance of the subcontract, the Subcontractor agrees to comply with the "Sensitive Foreign Nations Controls" requirements relating to those countries which from time to time, are identified to the University by written notice from DOE as sensitive nations. The Subcontractor shall have the right to terminate according to the termination for convenience clause of these terms and conditions, this subcontract if the University determines that it is unable, without substantially interfering with its policies or without adversely affecting its performance of this work under this subcontract as a result of such notification.

- (b) The Subcontractor agrees to incorporate this clause, including this paragraph (b) in all lower-tier subcontracts under this subcontract.

### **B38, Unclassified Controlled Nuclear Information (UCNI)**

- (a) Documents originated by the subcontractor or furnished by the Government through the University to the subcontractor in connection with this project may contain Unclassified Controlled Nuclear Information (UCNI) as defined in Section 148 of the Atomic Energy Act of 1954, as amended. Therefore, the following limitation notice is stamped or typed on the cover of the documents:

"NOT FOR PUBLIC DISSEMINATION. THIS DOCUMENT CONTAINS INFORMATION THAT MAY BE SUBJECT TO SECTION 148 OF THE ATOMIC ENERGY ACT, AS AMENDED."

The subcontractor shall be responsible for protecting such information from authorized dissemination in accordance with DOE regulations, requirement, and instructions.

- (b) UCNI may only be made available to authorized individuals. "Individuals" for purposes of this subcontract, means only U. S. citizens who have a need to know in the performance of official duties or DOE authorized activities and who are employees of the Government, employees of a Government contractor or subcontractors, or employees of a prospective Government contractor or subcontractor for the purpose of bidding on a Government contract.
- (c) All parties receiving UCNI shall be obliged under penalty of law to protect such information as required by 10 CFR 1017.17, such responsibility including but not limited to the following:
  - (1) **General.** UCNI requires protection from unauthorized dissemination. UCNI must be protected and controlled in a manner consistent with that customarily accorded other types of unclassified but sensitive information (e.g., proprietary business information, personnel, or medical records of employees, attorney-client information). The subcontractor shall establish and maintain a system for the protection of UCNI in its possession or under its control that is consistent with the physical protection standards established in this section. Each authorized individual or person granted special access to UCNI who receives, acquires, or produces UCNI or a document or material containing UCNI shall take reasonable and prudent steps to ensure that it is protected from unauthorized dissemination.
  - (2) **Protection in Use or Storage.** An authorized individual or a person granted special access to UCNI shall maintain physical control over any document or material containing an UCNI notice that is in use so as to prevent unauthorized access to it. When any document or material containing an UCNI notice is not in use, it must be stored in a secure container (e.g., locked desk or file cabinet) or in a location where access is limited (e.g., locked or guarded office or controlled access facility).
  - (3) **Reproduction.** A document or material containing an UCNI notice may be reproduced to the minimum extent necessary consistent with the need to carry out official duties without permission of the originator, provided that the reproduced document or material is marked and protected in the same manner as the original document or materials.
  - (4) **Destruction.** A document of material containing an UCNI notice may be disposed of by any method that ensure sufficiently complete destruction do prevent its retrieval (provided that the disposal is authorized by the archivist of the United State under 41 CFR 101-11.4 and by agency records disposition schedules).

(5) **Transmission.**

- (A) A document or material containing an UCNI notice must be packaged to prevent disclosure of the presence of UCNI when transmitted by a means that could allow access to the document or material by a person who is not an authorized individual or a person granted special access to UCNI. The address and return address must be indicated on the outside of the package.
- (B) A document or material containing an UCNI notice may be transmitted by the following means:
  - (i) U.S. first class, express, certified or registered mail;
  - (ii) Any means approved for the transmission of classified documents or material;
  - (iii) An authorized individual or a person granted special access to UCNI when he or she can control access to the document or material being transmitted; or
  - (iv) Any other means determined by the Assistant Secretary for Defense Programs to be sufficiently secure.
- (C) UCNI may be discussed or transmitted over an unprotected telephone or telecommunications circuit when required by operational considerations. More secure means of communication should be used whenever possible.

(6) **Automated Data Processing (ADP).** UCNI may be process or produced on any ADP system that is certified for classified information or that complies with the guidelines of Office of Management and Budget Circular No. A-71, "Security of Federal Automated Information Systems, or that has been approved for such use in accordance with the provisions of applicable DOE directives.

(d) **Civil Penalty.** Any person who violates Section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under Section 148 of the Atomic Energy Act, including these regulations, is subject to a civil penalty. The Assistant Secretary for Defense Programs may recommend to the Secretary imposition of this civil penalty, which shall not exceed \$100,000 for each violation.

## **B39, Disclosure of Information**

- (a) It is mutually expected that the activities under the subcontract will not involve classified information. It is understood, however, that if in the opinion of either party, this expectation changes before the expiration or termination of all activities arising under the subcontract, that the party shall notify the other party accordingly in writing without delay. In any event, the Subcontractor shall classify, safeguard, and otherwise act with respect to all classified information in accordance with applicable law and the requirements of DOE and shall promptly inform the University in writing if and when classified information becomes involved or, in the mutual judgment of the parties, it appears likely that classified information or material may become involved. In such event, the Subcontractor shall have the right to terminate performance of the work under the subcontract, and the provisions of the subcontract regarding termination for the convenience of the University shall apply.

- (b) The Subcontractor shall not permit any individual to have access to classified information except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12356, and DOE's regulations or requirements.
- (c) The term "*Restricted Data*," as used in this clause means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of special nuclear material in the production of energy. The term shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

## **B40, Limitation of Liability**

- (a) Except as provided in paragraphs (b) and (c) below, and except for remedies expressly provided elsewhere in the subcontract, the Subcontractor shall not be liable for loss of or damage to property of the University or the Government (excluding the goods delivered under the subcontract) that (1) occurs after University acceptance of the goods delivered under the subcontract and (2) results from any defects or deficiencies in the goods.
- (b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the University's acceptance of, the goods results from willful misconduct or lack of good faith on the part of any of the Subcontractor's managerial personnel. The term "Subcontractor's managerial personnel" as used in this clause means the Subcontractor's directors, officers, and any of the Subcontractor's managers, superintendents, or equivalent representatives who have supervision or direction of
  - (1) All or substantially all of the Subcontractor's business;
  - (2) All or substantially all of the Subcontractor's operations at any one facility at which the subcontract is being performed; or
  - (3) A separate and complete major industrial operation connected with the performance of the subcontract.
- (c) If the Subcontractor carries insurance or has established a reserve for self-insurance, covering liability for loss or damage suffered by the University or the Government through the purchase or use of the goods required to be delivered under the subcontract and to the extent of such insurance or reserve, the Subcontractor shall be liable to the University or the Government, to the extent of such insurance or reserve, for loss of or damage to property of the University or the Government occurring after University acceptance of, and resulting from any defects or deficiencies in the goods delivered under the subcontract.
- (d) The Subcontractor shall include this clause, including this paragraph (d) and supplemented as necessary to reflect the relationship of the contracting parties, in all lower-tier subcontracts.

## **B41, Limitation of Liability - High-Value Items**

- (a) Notwithstanding any other provision of the subcontract and except as provided in paragraphs (b) through (e) below, the Subcontractor shall not be liable for loss of or damage to property of the University or the Government (including the goods delivered



under the subcontract) that (1) occurs after University acceptance of the goods delivered under the subcontract and (2) results from any defects or deficiencies in the goods.

- (b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in or the University's acceptance of the goods results from willful misconduct or lack of good faith on the part of any of the Subcontractor's managerial personnel. The term "Subcontractor's managerial personnel" as used in this clause means the Subcontractor's directors, officers, and any of the Subcontractor's managers, superintendents, or equivalent representatives who have supervision or direction of
  - (1) All or substantially all of the Subcontractor's business;
  - (2) All or substantially all of the Subcontractor's operations at any one facility at which the subcontract is being performed; or
  - (3) A separate and complete major industrial operation connected with the performance of the subcontract.
- (c) If the Subcontractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the University or the Government through the purchase or use of the goods required to be delivered under the subcontract, the Subcontractor shall be liable to the University or the Government, to the extent of such insurance or reserve, for loss of or damage to property the University or the Government occurring after University acceptance of, and resulting from any defects or deficiencies in the goods delivered under the subcontract.
- (d)
  - (1) This clause does not diminish the Subcontractor's obligations, to the extent that they arise otherwise under the subcontract, relating to correction, repair, replacement, or other relief for any defect or deficiency in the goods delivered under the subcontract.
  - (2) Unless this is a cost-reimbursement subcontract, if loss or damage occurs and correction, repair, or replacement is not feasible or desired by the University, the Subcontractor shall, as determined by the University-
    - (i) Pay the University the amount it would have cost the Subcontractor to make correction, repair, or replacement before the loss or damage occurred; or
    - (ii) Provide other equitable relief.
- (e) This clause shall not limit or otherwise affect the University's rights under clauses, if included in this subcontract, that cover-
  - (1) Warranty of technical data;
  - (2) Ground and flight risks or aircraft flight risks; or
  - (3) Government property.
- (f) In each lower-tier subcontract, except a lower-tier subcontract covered by paragraph (g) below, the Subcontractor shall insert the appropriate clause, supplemented as necessary to reflect the relationship of the contracting parties, as follows:

- (1) In lower-tier subcontracts for high-value items only, after obtaining the Contract Administrator's advance written approval, insert this clause, including this paragraph (f).
- (2) In lower-tier subcontracts for other end items only, insert the clause at FAR 52.246-23, Limitation of Liability.
- (g) In any lower-tier subcontract for both high-value items for which this clause is appropriate, and other end items for which the clause B20 is appropriate, after obtaining the University's advance written approval to use this clause, the Subcontractor shall (1) include both clauses, (2) identify high-value items by line item, and (3) insert the following preamble before paragraph (a) of this clause as used in that lower-tier subcontract:

*(This clause shall apply only to those items identified in this subcontract as being subject to this clause.)*

## **B42, Limitation of Liability - Services**

- (a) Except as provided in paragraphs (b) and (c) below, and except to the extent that the Subcontractor is expressly responsible under the subcontract for deficiencies in the services required to be performed under it (including any materials furnished in conjunction with those services), the Subcontractor shall not be liable for loss of or damage to property of the University or the Government that (1) occurs after University acceptance of services performed under the subcontract, and (2) results from any defects or deficiencies in the services performed or materials furnished.
- (b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the University's acceptance of, services performed or materials furnished results from willful misconduct or lack of good faith on the part of any of the Subcontractor's managerial personnel. The term "Subcontractor's managerial personnel" as used in this clause means the Subcontractor's directors, officers, and any of the Subcontractor's managers, superintendents, or equivalent representatives who have supervision or direction of-
  - (1) All or substantially all of the Subcontractor's business;
  - (2) All or substantially all of the Subcontractor's operations at any one facility at which the subcontract is being performed; or
  - (3) A separate and complete major industrial operation connected with the performance of the subcontract.
- (c) If the Subcontractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the University or the Government through the Subcontractor's performance of services or furnishing of materials under the subcontract, the Subcontractor shall be liable to the University or the Government, to the extent of such insurance or reserve, for loss of or damage to property of the University or the Government occurring after University acceptance of, and resulting from any defects and deficiencies in, services performed or materials furnished under the subcontract.

- (d) The Subcontractor shall include this clause, including this paragraph (d), supplemented as necessary to reflect the relationship of the contracting parties, in all lower-tier subcontracts over \$25,000.

## **B43, Work on University or Government Premises**

To the extent that the Subcontractor's work under the subcontract involves performance by the Subcontractor or its lower-tier subcontractors at University or Government-owned sites or facilities, the following provisions shall apply:

- (a) **Liens.** The Subcontractor agrees that, at any time upon the request of the University, it will submit a sworn statement setting forth the services performed or goods furnished by lower-tier subcontractors and the amount due and to become due to each. The Subcontractor further agrees that before the final payment called for hereunder, it will, if requested, submit to the University a complete set of vouchers showing what payments have been made for goods and labor used in connection with the work called for hereunder.
- (b) **Indemnify and Hold Harmless.**
  - (1) The Subcontractor shall indemnify and hold harmless the University and the Government from all claims, demands, causes of action, or suits, of whatever nature, arising out of the services, labor, and goods furnished by the Subcontractor or its lower-tier subcontractors under the subcontract, and from all laborer's, materialmen's, and mechanic's liens upon the real property upon which the work is located or any other property of the University or the Government; and
  - (2) Promptly notify the University, in writing, of any claim, demands, causes of action, or suits brought to its attention. The Subcontractor shall forward with such notification copies of all pertinent papers received by the Subcontractor with respect to any such claims, demands, cause of action or suits, or liens. The Subcontractor, at the request of the University, shall do all things and execute and deliver all appropriate documents and assignments in favor of the University or the Government of all the Subcontractor's rights and claims growing out of such asserted claims as will enable the University and the Government to protect their respective interests by litigation or other means.

The final payment shall not be made until the Subcontractor, if required, shall deliver to the University a complete release of all liens arising out of the subcontract or receipts in full in lieu thereof as the University may require, and if required in either case, an affidavit that as far as it has knowledge or information, the receipts include all the labor and goods for which a lien could be filed. But the Subcontractor may, if any lower-tier subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the University to indemnify it against any claim by lien or other means. If any lien or claim remains unsatisfied after all payments are made, the Subcontractor shall refund to the University all moneys that the latter may be compelled to pay in discharging such lien or claim, including all costs and reasonable attorney's fees.

- (c) **Cleaning Up.** The Subcontractor shall at all times keep University or Government premises and adjoining premises where the work is performed free from accumulations of waste material or rubbish caused by its employees, work of its employees, or work of

any of its lower-tier subcontractors. At the completion of the work, the Subcontractor shall remove all rubbish from and about the building and all of its and its lower-tier subcontractor's tools, scaffolding, and surplus materials and shall leave the work area "broom clean" or its equivalent, unless more exactly specified. In cases of a dispute between the Subcontractor and lower-tier subcontractors employed on or about the structure or structures upon which the work is to be done, as herein provided, as to responsibility for the removal of the rubbish, or in case the same is not promptly removed as herein required, the University may remove the rubbish and charge the cost to the Subcontractor.

- (d) **Employees.** The Subcontractor shall not employ for the work any unfit person or anyone not skilled in the work assigned to the person and shall devote only its best qualified personnel to work under the subcontract. Should the University deem anyone employed on the work incompetent or unfit for duty and so inform the Subcontractor, the Subcontractor shall immediately remove such person from work under the subcontract, and that person shall not again, without written permission of the University, be assigned to work under the subcontract.
- (e) **Insurance.** The Subcontractor shall maintain with reputable companies insurance in amounts required under the subcontract sufficient to protect the University and the Government from any and all public liability and Workers' Compensation claims at all times during the performance of the subcontract. If requested, the Subcontractor shall supply the University with one copy of certificates of insurance covering policies required hereunder and shall obtain satisfactory evidence of lower-tier subcontractors compliance with these provisions before their participation in the work. In the absence of more specific direction from the University, the Subcontractor shall maintain additional insurance to the extent consistent with sound business practice.
- (f) **Health and Safety Plan. When specified in Section F of the subcontract schedule, the** Subcontractor shall submit to the Contract Administrator a Health and Safety Plan the meets the requirements of the subcontract appendix entitled Safety and Health Requirements. The plan shall be submitted for review and approval within 30 days after the award of the subcontract. No work shall be performed on University or Government premises until approval of the plan is received by the Subcontractor.

## **B44, Environment, Safety, and Health Compliance and Stop Work**

- (1) The Subcontractor shall take all reasonable precautions in the performance of the work under the subcontract to protect the safety and health of employees and all other persons; minimize danger from all hazards to persons, property and the environment; and shall comply with all applicable health, safety, fire protection, and environmental regulations and requirements, including notification and reporting requirements of the Subcontractor, the University, and DOE. Additionally, in the performance of work under the subcontract, the Subcontractor shall take all reasonable measures and precautions at all times to prevent injuries to or the death of its employees or any other person. Such measures or precautions shall include, but shall not be limited to, employing all safeguards and posting all warnings necessary to protect workers and others against any conditions which could be dangerous and providing a safe environment designed to prevent accidents of any kind whenever work is being performed under the subcontract. The Subcontractor shall bear the sole responsibility for Environment, Safety, and Health (ESH) compliance in connection with its work under the subcontract and shall indemnify and hold harmless the University from all claims for damages for any injury, damages or

death to any person arising from the Subcontractor's work under the subcontract and from all fines, penalties or monetary damages assessed by any regulatory authority arising from the Subcontractor's work under the subcontract.

- (2) Without prejudice to any other "Stop Work" rights contained in the subcontract, any DOE, University or subcontract employee may stop work under the subcontract in accordance with the provisions of Laboratory Procedure 116, "Stop Work and Restart". The Subcontractor shall make no claim for an extension of time or compensation or damages by reason of or in connection with work stopped in accordance with this clause.

## **B45, Health and Safety Instructions**

- (a) DOE requires that the University review the health and safety program of each subcontractor if the subcontractor has employees on full-time assignment at the Los Alamos National Laboratory. Compliance requires the University to alert you to the following requirements:
  - (1) All of the Subcontractor's local supervisors shall ensure that the University (the Contract Administrator and Laboratory Group ESH-5, Industrial Hygiene and Safety) is notified immediately of any occupational injury or illness that occurs on Laboratory-controlled premises regardless of where and when treated.
  - (2) The Subcontractor's performance shall be reviewed at intervals deemed necessary by the University to ensure that the Subcontractor is in compliance with DOE regulations.
  - (3) The University will investigate incidents occurring on Laboratory-controlled premises involving personal injury requiring more medical attention than first aid, significant damage to property of the Government or the Subcontractor or of possible public concern.
- (b) The following information shall also be furnished in writing for work to be performed at Laboratory facilities:
  - (1) Average number of full-time employees required by the Subcontractor and,
  - (2) Name, address, and telephone number of the local supervisor or company official to be notified if the above employees became injured or ill.

## **B46, Insurance**

- (a) Pursuant to paragraph (e) of the clause entitled Work on University or Government Premises, the Subcontractor shall maintain the following types and minimum levels of insurance coverage:
  - (1) General Liability - Bodily injury - comprehensive form, minimum \$500,000 per occurrence.
  - (2) Workers' Compensation and Employer's Liability - Statutory limits for the state in which the work is performed.

- (b) When subcontract performance requires the use of an automobile, Automotive Liability, Comprehensive Form in the following minimum levels of coverage shall be maintained by the Subcontractor:
  - (1) Property damage - \$20,000 per occurrence.
  - (2) Other - statutory requirements for the state in which the work is performed that is sufficient to meet normal and customary claims.
- (c) If the subcontract is for professional services such as those performed by doctors, lawyers, and architect-engineers, Professional Liability coverage in the following minimum levels shall be provided by the Subcontractor:  
\$1 million each occurrence and \$2 million project aggregate.
- (d) If aircraft are used to perform the subcontract, the Subcontractor shall provide the following types and minimum levels of insurance coverage:
  - (1) Bodily injury - \$200,000 per person and \$500,000 per occurrence, excluding passenger liability.
  - (2) Bodily injury, passenger liability - \$200,000 multiplied by the number of seats or passengers, whichever is greater.
  - (3) Property damage - \$200,000 per occurrence.

## **B47, Nuclear Hazards Indemnity Agreement**

- (a) **Authority.** This clause is incorporated into the subcontract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended (hereinafter call the Act).
- (b) **Definitions.** The definitions set out in the Act shall apply to this clause.
- (c) **Financial protection.** Except as hereafter permitted or required in writing by DOE or the University, the Subcontractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE or the University may, however, at any time require in writing that the Subcontractor provide and maintain financial protection of such a type and in such amount as DOE or the University shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the Subcontractor by DOE or the University.
- (d) **Indemnification.**
  - (1) To the extent that the Subcontractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE or the University, DOE or the University will indemnify the Subcontractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the Subcontractor and other persons indemnified as are approved by DOE or the University, provided that DOE's and the University's liability, including such legal costs,

shall not exceed the amount set forth in section 170e.(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with the subcontract.

- (2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under the subcontract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e) **Waiver of Defenses.**

- (1) In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the Subcontractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or government immunity.
- (2) In the event of an extraordinary nuclear occurrence which
  - (i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or
  - (ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or
  - (iii) Arises out of or results from the possession, operation, or use by the Subcontractor or a lower-tier subcontractor of a device utilizing special nuclear material or by-product material, during the course of the subcontract activity; or
  - (iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the Subcontractor, on behalf of itself and other persons indemnified, agrees to waive
    - (A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault or persons indemnified, including, but not limited to
      - (1) Negligence;
      - (2) Contributory negligence;
      - (3) Assumption of risk; or
      - (4) Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;
    - (B) Any issue or defense as to charitable or governmental immunity; and
    - (C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage

and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

- (v) The term extraordinary nuclear occurrence means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.
  - (vi) For the purposes of that determination, "offsite" as that term is used in 10 CFR part 840 means away from "the subcontract location" which phrase means any DOE facility, installation, or site at which contractual activity under the subcontract is being carried on, and any Subcontractor-owned or controlled facility, installation, or site at which the Subcontractor is engaged in the performance of contractual activity under the subcontract.
- (3) The waivers set forth above
- (i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;
  - (ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;
  - (iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;
  - (iv) Shall not apply injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;
  - (v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;
  - (vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;
  - (vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and
  - (viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (b)



the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

- (f) **Notification and litigation of claims.** The Subcontractor shall give immediate written notice to DOE and the University of any known action or claim filed or made against the Subcontractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE through the University, the Subcontractor shall furnish promptly to DOE, copies of all pertinent papers received by the Subcontractor or filed with respect to such actions of claims. DOE and the University shall have the right to, and may collaborate with, the Subcontractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE and the University for the payment of any claim that DOE University may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the Contractor or other person indemnified in any action brought upon any claim that DOE and the University may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE or the University, the Subcontractor shall furnish a reasonable assistance in effecting a settlement or asserting a defense.
- (g) **Continuity of DOE obligations.** The obligations of DOE and the University under this clause shall not be affected by any failure on the part of the Subcontractor to fulfill its obligation under the subcontract and shall be unaffected by the death, disability, or termination of the Subcontractor, or by the completion, termination or expiration of the subcontract.
- (h) **Effect of other clauses.** The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of the subcontract, including the clause entitled Contract Disputes, provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, Officials Not to Benefit, and Examination of Records by the Comptroller General, and any provisions that are later added to the subcontract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.
- (i) **Civil Penalties. Reserved.**
- (j) **Criminal penalties.** Any individual director, officer, or employee of the Subcontractor or of its lower-tier subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223c. of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations, or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.
- (k) **Inclusion in subcontracts.** The Subcontractor shall insert this clause in any lower-tier subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in lower-tier subcontracts in which the lower-tier subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b of the Act or NRC agreements of indemnification under 170c. or k. of the Act for the activities under the subcontract.

## **B48, Preservation of Individual Occupational Radiation Exposure Records**

Individual occupational radiation exposure records generated in the performance of work under the subcontract shall be subject to inspection by the University and DOE and shall be preserved by the Subcontractor until disposal is authorized by the University or DOE or at the option of the Subcontractor delivered to the University upon completion or termination of the subcontract. If the Subcontractor exercises the foregoing option, title to such records shall vest in DOE upon delivery.

## **B49, Competition in Subcontracting**

The Subcontractor shall select lower-tier subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the subcontract.

## **B50, Notice of Total Small Business Set-Aside**

- (a) **Definition.** *"Small business concern"* as used in this clause means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts or subcontracts, and qualified as a small business under the size standards defined in the solicitation
- (b) **General.**
  - (1) Offers are solicited only from small business concerns. Offers received from concerns that are not small business concerns shall be considered nonresponsive and will be rejected.
  - (2) Any award resulting from the solicitation will be made to a small business concern.
- (c) **Agreement.** A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the subcontract, only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service subcontracts.

## **B51, Notice of Partial Small Business Set-Aside**

- (a) **Definitions.**

*"Small business concern,"* as used in this clause means a concern including its affiliates that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts or subcontracts, and qualified as a small business under the size standards in the solicitation.
- (b) **General.**

- (1) As identified elsewhere in the solicitation, a portion of this requirement has been set aside for award to one or more small business concerns.
  - (2) Offers on the non-set-aside portion will be evaluated first and award will be made on that portion in accordance with the provisions of the solicitation.
  - (3) The set-aside portion will be awarded at the highest unit price(s) in the subcontract(s) for the non-set-aside portion and adjusted to reflect transportation and other costs appropriate for the selected Subcontractor(s).
  - (4) The Subcontractor(s) for the set-aside portion will be selected from among the small business concerns that submitted responsive offers on the non-set-aside portion. Negotiations will be conducted with the concern that submitted the lowest responsive offer on the non-set-aside portion. If the negotiations are not successful or if only part of the set-aside portion is awarded to that concern, negotiations will be conducted with the concern that submitted the second-lowest responsive offer on the non-set-aside portion. This process will continue until a subcontract or subcontracts are awarded for the entire set-aside portion.
  - (5) The University reserves the right to not consider token offers or offers designed to secure an unfair advantage over other offerors eligible for the set-aside portion.
- (c) **Agreement.** For the set-aside portion of the acquisition, a manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the subcontract, only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service subcontracts.

## **B52, Limitation on Subcontracting**

- (a) This clause does not apply to the unrestricted portion of a partial set-aside.
- (b) By submission of an offer and execution of a subcontract, the Subcontractor agrees that in performance of the subcontract in the case of a subcontract for —
  - (1) Services (except construction). At least 50 percent of the cost of subcontract performance incurred for personnel shall be expended for employees of the concern.
  - (2) Supplies (other than procurement from a regular dealer in such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.
  - (3) General construction. The concern will perform at least 15 percent of the cost of the subcontract, not including the cost of materials, with its own employees.

- (4) Construction by special trade contractors. The concern will perform at least 25 percent of the cost of the subcontract, not including the cost of materials, with its own employees.

### **B53, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns**

(Incorporated by Reference (FAR 52.219-8))

### **B54, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan**

(Incorporated by Reference)(FAR 52.219-9)

### **B55, Contract Work Hours and Safety Standards Act - Overtime Compensation**

- (a) **Overtime Requirements.** No Subcontractor or lower-tier subcontractor contracting for any part of the subcontract work that may require or involve the employment of laborers or mechanics (see FAR 22.300) shall require or permit any such laborers or mechanics in any workweek in which the individual is employed on such work to work in excess of 40 hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than 1.5 times the basic rate of pay for all hours worked in excess of 40 hours in such workweek.
- (b) **Violation, Liability for Unpaid Wages, and Liquidated Damages.** In the event of any violation of the provisions set forth in paragraph (a) of this clause, the Subcontractor and any lower-tier subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such Subcontractor and lower-tier subcontractor shall be liable to the Government (in the case of work done under subcontract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions set forth in paragraph (a) of this clause in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wage required by provisions set forth in paragraph (a) of this clause.
- (c) **Withholding for Unpaid Wages and Liquidated Damages.** Upon its own action or upon written request of an authorized representative of the Department of Labor, the University shall withhold or cause to be withheld, from any moneys payable on account of work performed by the Subcontractor or lower-tier subcontractor under any such subcontract; any other Federal contract with the same Subcontractor, or any Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the same Subcontractor, such sums as may be determined to be necessary to satisfy any liabilities of such Subcontractor or lower-tier subcontractor for unpaid wages and liquidated damages as provided in the provisions set forth in paragraph (b) of this clause.
- (d) **Payrolls and Basic Records.**
- (1) The Subcontractor or lower-tier subcontractor shall maintain payrolls and basic payroll records during the course of subcontract work and shall preserve them for a period of three years from the completion of the subcontract for all laborers and mechanics working on the subcontract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Nothing in this paragraph shall require the duplication of records required to be maintained for construction

work by the Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Davis-Bacon Act.

- (2) The records to be maintained under paragraph (d)(1) of this clause shall be made available by the Subcontractor or lower-tier subcontractor for inspection, copying, or transcription by authorized representatives of the University, the DOE, or the Department of Labor. The Subcontractor or lower-tier subcontractor shall permit such representatives to interview employees during working hours on the job.
- (e) **Subcontracts.** The Subcontractor or lower-tier subcontractor shall insert in any subcontracts the provisions set forth in paragraphs (a) through (e) of this clause and also a clause requiring the subcontractors to include these provisions in any lower-tier subcontracts. The Subcontractor shall be responsible for compliance by any lower-tier subcontractor with the provisions set forth in paragraphs (a) through (e) of this clause.

## **B56, Authorization for Subcontractor's Use of Government Supply Sources**

The University may issue the Subcontractor an authorization to use Government supply sources in the performance of the subcontract. Title to all property acquired by the Subcontractor under such an authorization shall vest in the Government unless otherwise specified in the subcontract. Such property shall not be considered to be Government-furnished property as distinguished from Government property. The provisions of the Property clause, except its paragraphs (a) and (b), shall apply to all property acquired under such authorization.

## **B57, Property Furnished "As Is"**

- (a) The University makes no warranty whatsoever with respect to Government property furnished "as is," except that the property is in the same condition as when placed at the f.o.b. point specified in the solicitation as when inspected by the Subcontractor pursuant to the solicitation or, if not inspected by the Subcontractor, as when last available for inspection under the solicitation.
- (b) The Subcontractor may repair any property made available on an "as is" basis. Such repair will be at the Subcontractor's expense except as otherwise provided in this clause. Such property may be modified at the Subcontractor's expense, but only with the written permission of the University. Any repair or modification of property furnished "as is" shall not affect its title with the Government.
- (c) If there is any change in the condition of Government property furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation and if such change will adversely affect the Subcontractor, the Subcontractor shall, upon receipt of the property, notify the University detailing the facts and, as directed by the University, either
  - (1) Return such property at the University's expense or otherwise dispose of the property; or
  - (2) Effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Subcontractor, the University shall equitably adjust any contractual provisions

affected by the return, disposition, or repair in accordance with the procedures provided for in the Changes clause of the subcontract. The foregoing provisions for adjustment are the exclusive remedy available to the Subcontractor, and the University shall not be otherwise liable for any delivery of Government property furnished "as is" in a condition other than that in which it was originally offered.

- (d) Except as otherwise provided in this clause, Government property furnished "as is" shall be governed by the Property clause of the subcontract.

## **B58, Special Test Equipment**

- (a) *"Special test equipment,"* as used in this clause means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a subcontract. It consists of items or assemblies of equipment, including standard or general purpose items or components, that are interconnected and interdependent so as to become a new functional entity for special testing purposes. It does not include material, special tooling, facilities (except foundations and similar improvements necessary for installing special test equipment), and plant equipment items used for general facility testing purposes.
- (b) The Subcontractor may either acquire or fabricate special test equipment at University expense when the equipment is not otherwise itemized in the subcontract and when the prior approval of the University has been obtained. At least 30 days in advance, the Subcontractor shall provide the University with a written notice of the Subcontractor's intention to acquire or fabricate the special test equipment. As a minimum, the notice shall include an estimated aggregate cost of all items and components of the equipment, the individual cost of which is less than \$5,000, and shall include the following information on each item or component of equipment costing \$5,000, or more:
  - (1) The end use application and function of each proposed special test unit and identification of special characteristics and the reasons for the classifications of the test unit as special test equipment;
  - (2) A complete description of the items to be acquired and the items to be fabricated by the Subcontractor;
  - (3) The estimated cost of the item of special test equipment or component; and
  - (4) A statement that intraplant screening of the Subcontractor's and Government-owned special test equipment and components has been accomplished and that no such equipment or components are available for use in performing the subcontract.
- (c) The University may furnish any special test equipment or components rather than approve their acquisition or fabrication by the Subcontractor. Such University-furnished items shall be subject to the Property clause, except that the University shall not be obligated to deliver such items any sooner than the Subcontractor could have acquired or fabricated them after expiration of the 30-day period for notice in paragraph (b) of this clause. However, unless the University notifies the Subcontractor of its decision to furnish the items within the 30-day period and subject to any other applicable provisions of the subcontract, the Subcontractor may proceed to acquire or fabricate the equipment or components.

- (d) In any lower-tier subcontract that provides that special test equipment or components may be acquired or fabricated for the University, the Subcontractor shall insert provisions that conform substantially to the language of this clause, including this paragraph (d). The Subcontractor shall furnish the names of such lower-tier subcontractors to the University.
- (e) If an engineering change requires either the acquisition or fabrication of new special test equipment or substantial modification of existing special test equipment, the Subcontractor shall comply with paragraph (b) above. In so complying, the Subcontractor shall identify the change order that requires the proposed acquisition, fabrication, or modification.

## **B59, Organizational Conflicts of Interest**

- (a) Purpose. The purpose of this clause is to ensure that the Subcontractor (1) is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this subcontract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this subcontract.
- (b) Scope. The restrictions described herein shall apply to performance or participation by the Subcontractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "Subcontractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity.
  - (1) Use of Subcontractor's Work Product.
    - (i) The Subcontractor shall be ineligible to participate in any capacity in Department of Energy contracts, subcontracts, or proposals therefor (solicited and unsolicited) which stem directly from the Subcontractor's performance of work under this subcontract for a period of five years after the completion of this subcontract. Furthermore, unless so directed in writing by the University, the Subcontractor shall not perform any advisory and assistance services work under this subcontract on any of its products or services or the products or services of another firm if the Subcontractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the Subcontractor from competing for follow-on contracts for advisory and assistance services.
    - (ii) If, under this subcontract, the Subcontractor prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the Subcontractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The Subcontractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the University, in which case the restriction in this subparagraph shall not apply.
    - (iii) Nothing in this paragraph shall preclude the Subcontractor from offering or selling its standard and commercial items to the Government.

(2) Access to and use of information.

- (i) If the Subcontractor, in the performance of this subcontract, obtains access to information, such as Department of Energy plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or data which has not been released or otherwise made available to the public, the Subcontractor agrees that without prior written approval of the University it shall not:
  - (A) use such information for any private purpose unless the information has been released or otherwise made available to the public;
  - (B) compete for work for the Department of Energy based on such information for a period of six (6) months after either the completion of this subcontract or until such information is released or otherwise made available to the public, whichever is first;
  - (C) submit an unsolicited proposal to the Government or the University which is based on such information until one year after such information is released or otherwise made available to the public; and
  - (D) release such information unless such information has previously been released or otherwise made available to the public by the Department of Energy or the University.
- (ii) In addition, the Subcontractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or other confidential or privileged technical, business, or financial information under this subcontract, it shall treat such information in accordance with any restrictions imposed on such information.
- (iii) The Subcontractor may use technical data it first produces under this subcontract for its private purposes consistent with subparagraphs (b)(2)(i)(A) and (D) of this clause and the patent, rights in data, and security provisions of this subcontract.

(c) Disclosure after award.

- (1) The Subcontractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this subcontract, occur during the performance of this subcontract, it shall make an immediate and full disclosure of such changes in writing to the University. Such disclosure may include a description of any action which the Subcontractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The University may, however, terminate the subcontract for convenience if it deems such termination to be in the best interest of the University or the Government.



- (2) In the event that the Subcontractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the University, the University may terminate this subcontract for default.
- (d) Lower-tier Subcontracts.
  - (1) The Subcontractor shall include a clause, substantially similar to this clause, including this paragraph, in lower-tier subcontracts expected to exceed the simplified acquisition threshold determined in accordance with 48 CFR (FAR) Part 13 and involving performance of advisory and assistance services as that term is defined at 48 CFR (FAR) 37.201. The terms 'subcontract,' 'Subcontractor,' and 'University' shall be appropriately modified to preserve the University's and the Government's rights.
  - (2) Prior to the award under this subcontract of any such lower-tier subcontracts for advisory and assistance services, the Subcontractor shall obtain from the proposed lower-tier subcontractor or consultant the disclosure required by 48 CFR (DEAR) 909.507-1, and shall determine in writing whether the interests disclosed present an actual or significant potential for an organizational conflict of interest. Where an actual or significant potential organizational conflict of interest is identified, the Subcontractor shall take actions to avoid, neutralize, or mitigate to the satisfaction of the Subcontractor the organizational conflict. If the conflict cannot be avoided or neutralized, the Subcontractor must obtain the approval of the University prior to entering into the lower-tier subcontract.
- (e) Remedies. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this subcontract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the University may terminate the subcontract for default, disqualify the Subcontractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this subcontract.
- (f) Waiver. Requests for waiver under this clause shall be directed in writing to the University Contract Administrator and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the University and the Government, the University may grant such a waiver in writing.

## **B60, Privacy Act Notification**

The Subcontractor will be required to design, develop, or operate a system of records on individuals to accomplish a federal agency function subject to the Privacy Act of 1974, P.L. 93-579, as amended (5 U.S.C. 552a), and applicable agency regulations. Violations of the Act may involve the imposition of criminal penalties.

## **B61, Privacy Act**

- (a) **Definitions.** *"Operation of a system of records,"* as used in this clause means performance of

any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

*"Record,"* as used in this clause means any item, collection or grouping of information about an individual that is maintained by or on behalf of a Government agency, including but not limited to education, financial transactions, medical history, and criminal or employment history and that contains the person's name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint, voiceprint, or a photograph.

*"System of records on individuals,"* as used in this clause means a group of any records under the control of any Government agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

- (b) The Subcontractor agrees to
  - (1) Comply with the Privacy Act of 1974 (the Act) and the rules and regulations of the DOE issued under the Act in the design, development, or operation of any system of records on individuals to accomplish a Government agency function when the subcontract specifically identifies the systems of records and the design, development, or operation work that the Subcontractor is to perform;
  - (2) Include the Privacy Act notification contained in the subcontract, in every solicitation and resulting lower-tier subcontract, and in every lower-tier subcontract awarded without a solicitation when the statement of work in the proposed lower-tier subcontract requires the design, development, or operation of a system of records on individuals that is subject to the ACT; and
  - (3) Include this clause, including this subparagraph (3), in all lower-tier subcontracts awarded under the subcontract that requires the design, development, or operation of such a system of records.
- (c) If the Act is violated, a civil action may be brought against the Government agency involved when the violation concerns the design, development, or operation of a system of records on individuals to accomplish a Government agency function, and criminal penalties may be imposed upon the officers or employees of the Government agency when the violation concerns the operation of a system of records on individuals to accomplish a Government agency function. For purposes of the Act, when the subcontract is for the operation of a system of records on individuals to accomplish a Government agency function, the Subcontractor and any employee of the Subcontractor is considered to be an employee of the Government agency.

## **B62, Termination for Convenience (Applies to Educational and Other Nonprofit Institutions)**

- (a) The University may terminate performance of work under the subcontract in whole or, from time to time, in part if the University determines that a termination is in the University's or the Government's interest. The University shall terminate by delivering to the Subcontractor a Notice of Termination specifying the extent of termination and the effective date.

- (b) After receipt of a Notice of Termination and, except as directed by the University, the Subcontractor shall immediately proceed with the following obligations:
- (1) Stop work as specified in the notice.
  - (2) Place no further lower-tier subcontracts or orders except as necessary to complete the continued portion of the subcontract.
  - (3) Terminate all applicable lower-tier subcontracts and cancel or divert applicable commitments covering personal services that extend beyond the effective date of termination.
  - (4) As directed by the University, assign to the University all right, title, and interest of the Subcontractor under the lower-tier subcontracts terminated, in which case the University shall have the right to settle or pay any termination settlement proposal arising out of those terminations.
  - (5) With approval or ratification to the extent required by the University, settle all outstanding liabilities and termination settlement proposals arising from the termination of lower-tier subcontracts; approval or ratification will be final for purposes of this clause.
  - (6) As directed by the University, transfer title (if not already transferred) and deliver to the University any information and items that, if the subcontract had been completed, would have been required to be furnished, including (i) goods produced, in process, or acquired for the work terminated and (ii) completed or partially completed plans, drawings, and information.
  - (7) Complete performance of the work not terminated.
  - (8) Take any action that may be necessary or that the University may direct to protect and preserve the property related to the subcontract that is in the possession of the Subcontractor and in which the University or the Government has or may acquire an interest.
  - (9) As directed or authorized by the University, use its best efforts to transfer or dispose of termination inventory other than that retained by the University under subparagraph (6) above, provided however, that the Subcontractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by and at prices approved by the University. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the University under the subcontract, credited to the price or cost of the work, or paid in any other manner directed by the University.
- (c) After termination, the Subcontractor shall submit a final termination settlement proposal to the University in the form and with the certification prescribed by the University. The Subcontractor shall submit the proposal promptly but no later than one year from the effective date of termination unless extended in writing by the University upon written request of the Subcontractor within this one-year period. If the Subcontractor fails to submit the termination settlement proposal within the time allowed, the University may determine, on the basis of information available, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.

- (d) Subject to paragraph (c) above, the Subcontractor and the University may agree upon the whole or any part of the amount to be paid because of the termination. This amount may include reasonable cancellation charges incurred by the Subcontractor and any reasonable loss on outstanding commitments for personal services that the Subcontractor is unable to cancel, provided that the Subcontractor exercised reasonable diligence in diverting such commitments to other operations. The subcontract shall be amended and the Subcontractor paid the agreed amount.
- (e) The cost principles and procedures in Subpart 31.3 of the FAR, in effect on the date of the subcontract, shall govern all costs claimed, agreed to, or determined under this clause; however, if the Subcontractor is not an educational institution and is a nonprofit organization under Office of Management and Budget (OMB) Circular A-122, Cost Principles for Nonprofit Organizations, those cost principles shall apply, provided that if the Subcontractor is a nonprofit institution listed in Attachment C of OMB Circular A-122, the cost principles at FAR Subpart 31.2 for commercial organizations shall apply to such subcontractor.
- (f) Under the terms and conditions it prescribes, the University may make partial payments against costs incurred by the Subcontractor for the terminated portion of the subcontract if the University believes the total of these payments will not exceed the amount to which the Subcontractor will be entitled.
- (g) The Subcontractor has the right of appeal as provided under the Disputes clause of the subcontract, except that if the Subcontractor failed to submit the termination settlement proposal within the time provided in paragraph (c) and failed to request a time extension, there is no right of appeal.

## **B63, Inspection of Research and Development (Short Form)**

The University has the right to inspect and evaluate the work performed or being performed under the subcontract and the premises where the work is being performed at all reasonable times and in a manner that will not unduly delay the work. If the University performs inspection or evaluation on the premises of the Subcontractor or a lower-tier subcontractor, the Subcontractor shall furnish and shall require lower-tier subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these tasks.

## **B64, Whistleblower Protection**

- (a) The Subcontractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 CFR Part 708, with respect to work performed on University or Government Premises.
- (b) The Subcontractor shall insert or have inserted the substance of this clause, including this paragraph (b) in subcontracts, at all tiers, with respect to work performed on University or Government premises.

